(10)

No. 92-207-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Xavier V. Padilla, et al.

Docketed:
July 30, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Nash,Walter, Bloom,Michael, Dichter,Stephen, Simpson,Donald, Bono,David A.

Time to file ext by J. O'Connor to & inc July 30, 1992.

Entry	Date	Note	Proceedings and Orders
1	Jun 23 1992		Application (A91-957) granted by Justice O'Connor extending the time to file until July 30, 1992.
2	Jun 30 1992	G	Application (A91-957) to extend the time to file a petition for a writ of certiorari from June 30, 1992 to July 30, 1992, submitted to Justice O'Connor.
3	Jul 30 1992	G	Petition for writ of certiorari filed.
5	Aug 31 1992		Order extending time to file response to petition until October 5, 1992.
6	Aug 31 1992		This extension of time is granted for all respondents.
8	Sep 30 1992		Brief of respondent Donald Lake Simpson in opposition filed.
9	Sep 30 1992	G	Motion of respondent Donald J. Simpson for leave to proceed in forma pauperis filed.
7	Oct 5 1992		Brief of respondent Xavier Padilla in opposition filed.
10	Oct 7 1992		DISTRIBUTED. October 30, 1992
12	Oct 26 1992	X	Reply brief of petitioner filed.
13	Nov 2 1992		Motion of respondent Donald J. Simpson for leave to proceed in forma pauperis GRANTED.
14	Nov 2 1992		Petition GRANTED.
			**********
15	Dec 17 1992		Brief of petitioner United States filed.
16	Dec 21 1992	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
22	Jan 5 1993	G	Motion of respondent Maria Simpson for leave to proceed further herein in forma pauperis filed.
23	Jan 5 1993	G	Motion of respondents Donald Simpson, et al. for appointment of counsel filed.
26	Jan 5 1993	D	Motion of respondents for divided argument filed.
17	Jan 7 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
20	Jan 8 1993		Order extending time to file brief of respondent on the merits until February 8, 1993.
18	Jan 11 1993		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
21	Jan 11 1993		REDISTRIBUTED. January 15, 1993
24	Jan 19 1993		Motion of respondent Maria Simpson for leave to proceed further herein in forma pauperis GRANTED.
25	Jan 19 1993		Motion for appointment of counsel GRANTED and it is

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No. 92-207-CFY

Entry	Date	Note	Proceedings and Orders
			ordered that David A. Bono, Esquire, of Washington, D. C., is appointed to serve as counsel for the respondents Donald Simpson, et al. in this case.
27	Jan 19 1993	G	Motion of respondent Xavier V. Padilla for leave to proceed further herein in forma pauperis filed.
28	Jan 19 1993	G	Motion of respondent Xavier V. Padilla for appointment of counsel filed.
29	Feb 1 1993		Record filed.
		*	Original proceedings United States District Court for the District of Arizona (1 Box)
33	Feb 5 1993		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
34	Feb 8 1993		Brief of respondents Donald Lake Simpson, et al. filed.
35	Feb 8 1993		Brief of respondents Xavier Padilla, et al. filed.
36	Feb 12 1993		CIRCULATED.
37	Feb 22 1993		Motion of respondents for divided argument DENIED.
38	Feb 22 1993		Motion of respondent Xavier V. Padilla for leave to proceed further herein in forma pauperis GRANTED.
39	Feb 22 1993		Motion for appointment of counsel GRANTED and it is ordered that Walter B. Nash, III, Esquire, of Tucson, Arizona, is appointed to serve as counsel for the respondent Xavier V. Padilla in this case.
32	Mar 3 1993		SET FOR ARGUMENT WEDNESAY, MARCH 24, 1993. (1ST CASE).
40	Mar 15 1993	X	Reply brief of petitioner filed.
41	Mar 24 1993		ARGUED.

92-207

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER V. PADILLA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether membership in a joint venture to transport drugs gives co-conspirators a legitimate expectation of privacy entitling them to challenge the investigatory stop of one of the members of the conspiracy, and the subsequent search of the vehicle he was driving.

PARTIES TO THE PROCEEDING

In addition to the named parties, Maria Jesus Padilla, Jorge Padilla, Donald Lake Simpson, Maria Sylvia Simpson, and Warren Strubbe are respondents.*

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* With respect to respondent Warren Strubbe, the court of appeals held that he lacks a Fourth Amendment interest entitling him to challenge the legality of the government actions at issue. Although the government prevailed against respondent Strubbe in the court of appeals, he is nonetheless a respondent in this Court. See Sup. Ct. R. 12.4.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER V. PADILLA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 960 F.2d 854. The oral rulings and minute orders of the district court (App., *infra*, 22a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1992. On June 23, 1992, Justice O'Connor entered an order extending the time for filing a petition for a writ of certiorari to and including July 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An indictment returned in the United States District Court for the District of Arizona charged respondents with conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In addition, respondent Xavier Padilla was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. The district court granted motions to suppress most of the evidence in the case. The court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-21a.

1. On September 26, 1989, Officer Russell Fifer of the Arizona Department of Public Safety was patrolling on Interstate Highway 10 near Casa Grande, Arizona, when a Cadillac passed him. Although the Cadillac was initially traveling 65 to 70 miles per hour, it slowed to 50 miles per hour. The driver appeared to be acting suspiciously, so the officer followed the car for several miles. Due to a miscommunication, the police radio dispatcher informed Fifer that the license plates on the Cadillac were registered to a Pontiac. Officer Fifer signaled the driver of the Cadillac to stop, and the car pulled over. App., *infra*, 2a-3a; 5/8/90 Tr. 132-139, 143-145.

Luis Arciniega was the driver and sole occupant of the Cadillac. He gave Officer Fifer a driver's license in his own name and an insurance card in the name of respondent Donald Simpson. Another officer, who was assisting Fifer, asked Arciniega for permission to search the car for weapons or contraband, and Arciniega consented. The officer opened the trunk and immediately discovered 560 pounds of cocaine. Officer Fifer then arrested Arciniega. During the course of the stop, Officer Fifer learned from

the radio dispatcher that the initial license plate information was incorrect and that the plates were in fact registered to a Cadillac owned by respondent Donald Simpson. App., *infra*, 3a-4a; 5/15/90 Tr. 91-96.

Arciniega then agreed to make a controlled delivery of the cocaine. He made a telephone call from a motel in Tempe, Arizona, and shortly thereafter, respondents Jorge and Maria Padilla arrived at the motel. The Padillas were arrested when they tried to drive off in the Cadillac. Maria Padilla then led the officers to a house in which respondent Xavier Padilla was staying. App., *infra*, 4a-5a.

Law enforcement authorities learned that the cocaine-laden Cadillac belonged to a Customs agent, Donald Simpson. The investigation linked Simpson and his wife, respondent Maria Sylvia Simpson, to Xavier Padilla. The authorities ultimately concluded that the Simpsons and Xavier Padilla were the principals in a drug smuggling operation that transported drugs from Mexico on behalf of distributors who owned the drugs. DEA agents conducting a related investigation were able to link Warren Strubbe to the conspiracy, and they discovered another 440 pounds of cocaine, which had been unloaded from the Simpsons' Cadillac shortly before Arciniega's arrest. App., *infra*, 5a-7a; Excerpt of Record Doc. 259, at 4-8.

2. Prior to trial, respondents moved to suppress all the evidence discovered in the course of the investigation, claiming that the evidence was the fruit of the stop of Arciniega, which they argued was unlawful. Midway through the suppression hearing, the district court ruled that respondents had standing to challenge the stop of Arciniega. The court found that respondents had standing because they were involved in "a joint venture for transportation"

of the contraband, and that the joint venturers "had control of the contraband" at the time of the stop. App., *infra*, 22a.

At the conclusion of the evidentiary hearing, the district court ruled that Officer Fifer lacked reasonable suspicion to stop Arciniega.[1] App., *infra*, 25a. The court therefore "suppress[ed] the search of the Simpson vehicle being driven by Mr. Arciniega." *Id.* at 29a, 30a. Finding that there would not have been an investigation by Customs or the DEA without the illegal stop of Arciniega, the district court granted the motion to suppress all the evidence obtained during the course of the investigation. *Id.* at 31a-32a, 33a-34a.

3. The court of appeals affirmed the suppression order as to respondents Xavier Padilla, Donald Simpson, and Maria Simpson; remanded for further findings with respect to respondents Jorge and Maria Padilla; and reversed as to respondent Warren Strubbe.

a. In finding that the Simpsons and Xavier Padilla were entitled to challenge the stop of Arciniega, the court relied on a line of Ninth Circuit cases granting Fourth Amendment standing to participants in a joint criminal venture who have an interest in the place searched or the property seized by virtue of their membership in the joint venture. App., *infra*, 9a-11a. The Simpsons and Xavier Padilla had standing, the court concluded, "not simply because the Simpsons owned the car and jointly possessed the drugs with Xavier but also because they participated in the organization, particularly on the day of the stop." *Id.* at 12a.

[1] We did not challenge that ruling in the court of appeals, and we do not do so here.

The court held that Donald Simpson had standing because "[h]e was a critical player in the transportation scheme who was essential [because of his status as a Customs agent] in getting the drugs across the border." App., *infra*, 12a. Maria Simpson had standing, the court held, because she played "a supervisory role tying everyone together and overseeing the entire operation at least from the Mexico end." *Id.* at 12a-13a.

The court of appeals concluded that Xavier Padilla had standing because he "exhibited substantial control and oversight with respect to the purchase [of the drugs] in Mexico and * * * the transportation through Arizona." App., *infra*, 13a. In assessing his standing, the court concluded, "[i]t is inconsequential that he was not present at the stop nor that he was unable to exclude others from inspecting the vehicle." *Ibid.*

With respect to respondents Jorge and Maria Padilla, who attempted to pick up the cocaine-laden Cadillac following Arciniega's arrest, the court held that it was unable to determine from the record whether they were "responsible partners of the venture or mere employees in a family operation." App., *infra*, 15a. The court noted that they "did not control the drugs yet they were an integral part of the formalized business arrangement that did." *Id.* at 14a. Because it was not clear from the record, however, "if they shared any responsibility for the enterprise," *ibid.*, the court remanded for further findings on that point. Finally, the court held that co-defendant Warren Strubbe lacked standing, because he "demonstrated no active control or supervision over the drugs or the vehicle involved in this conspiracy." *Id.* at 15a-16a.

b. Having rejected the government's standing argument, the court of appeals held that the unlawful

stop of Arciniega justified the suppression of almost all the evidence discovered in the course of the ensuing investigation. App., *infra*, 17a-21a. The only evidence that the court of appeals held not to be suppressible was the statement of a witness who came forward more than two weeks after the stop of Arciniega and provided information about Xavier Padilla and Donald Simpson. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

Although respondents were not present at the stop of Luis Arciniega, the court of appeals permitted them to challenge the legality of that stop on the theory that they were joint venturers in the transportation of the drugs Arciniega was carrying. Their joint venture relationship, according to the court of appeals, gave respondents a sufficient interest in the Cadillac and the seized drugs to entitle them to challenge the stop of Arciniega, even though the stop did not interfere with their freedom of movement in any way.

The court of appeals' decision in this case is contrary to this Court's decisions holding that Fourth Amendment violations are personal and that only those whose own rights have been invaded may seek suppression of evidence seized as a result. The decision is also at odds with the law of every other circuit that has addressed the issue.

The question whether co-conspirators can acquire a legitimate expectation of privacy in each other's persons and effects based solely on their joint participation in a criminal venture is of considerable practical importance. This case illustrates that point dramatically, as the costs of suppressing the evidence against Arciniega's joint venturers are enormous. Although none of the respondents were illegally detained or searched, the courts below have suppressed

virtually all of the evidence against the leaders of the enterprise, including a corrupt federal law enforcement official, and have effectively terminated their prosecutions on serious drug trafficking charges.

1. a. The decision of the court of appeals is inconsistent with basic tenets of Fourth Amendment law. It is fundamental that "a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights." *United States* v. *Payner*, 447 U.S. 727, 731 (1980); see also *ibid.* ("the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party"). That principle follows from "the general rule that 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978), quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). This Court has accordingly stated that it is "beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." *Payner*, 447 U.S. at 735. See *Simmons* v. *United States*, 390 U.S. 377, 389 (1968); *Wong Sun* v. *United States*, 371 U.S. 471, 492 (1963). Accordingly, the fruits of Officer Fifer's stop of Arciniega should not be excluded as to respondents unless the stop of Arciniega violated their personal Fourth Amendment rights.

In allowing respondents to challenge the stop of Arciniega because they were joint venturers in the transportation of the cocaine,[2] the court of appeals

[2] Although the court of appeals concluded that Warren Strubbe did not have a sufficient role in the conspiracy to take

followed a long line of Ninth Circuit cases. Those cases have treated participation in a conspiracy as sufficient to give rise to a privacy interest in a place searched or a property interest in items seized, if the defendant's role in the conspiracy gave him joint control or supervisory responsibility over the premises searched or the property seized. App., *infra*, 9a. See *United States* v. *Johns*, 851 F.2d 1131 (1988); *United States* v. *Broadhurst*, 805 F.2d 849, 851-852 (1986); *United States* v. *Quinn*, 751 F.2d 980 (1984), cert. granted, 474 U.S. 900 (1985), cert. dismissed, 475 U.S. 791 (1986); *United States* v. *Pollock*, 726 F.2d 1456, 1465 (1984); *United States* v. *Johns*, 707 F.2d 1093, 1100 (1983), rev'd on other grounds, 469 U.S. 478 (1985); *United States* v. *Perez*, 689 F.2d 1336 (1982). The Ninth Circuit itself has characterized its doctrine as a "coconspirator exception" to traditional tests of Fourth Amendment standing. *United States* v. *Taketa*, 923 F.2d 665, 672 (1991).

The Ninth Circuit's "coconspirator exception" is contrary to Fourth Amendment principles established by this Court. In Alderman, this Court made clear that "[c]oconspirators and codefendants have been accorded no special standing" to assert Fourth Amendment violations. 394 U.S. at 172. See also *Standefer* v. *United States*, 447 U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973). That rule is based on this Court's view that "the

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advantage of the co-conspirator exception, and remanded for further findings regarding the role of Jorge and Maria Padilla, the court treated all the respondents' status as co-conspirators as an independent factor in determining Fourth Amendment standing. For ease of reference, we will sometimes refer to respondents collectively; we recognize, however, that the court of appeals has conclusively found standing only with respect to three of them.

additional benefits of extending the exclusionary rule to other defendants" are outweighed by "the public interest in prosecuting those accused of crime * * * on the basis of all the evidence which exposes the truth." *Alderman*, 394 U.S. at 175. See also *Payner*, 447 U.S. at 735. The Ninth Circuit's rule cannot be reconciled with that principle. Nor can it be reconciled with *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980). There, this Court held that the defendant had no privacy interest in a purse owned by another person, despite the fact that he had entrusted the purse's owner with drugs to carry in the purse. Emphasizing that the defendant did not have "any right to exclude other persons from access to [the] purse," *id.* at 105, the Court held that the defendant's ownership interest in the drugs did not give him a right to object to the search of the purse. *Rawlings* stands in sharp contrast to the holding of the court of appeals in this case that it was "inconsequential" to Xavier Padilla's claim of standing that he was not present at the stop, and "that he was unable to exclude others from inspecting the vehicle." App., *infra*, 13a.

Respondents' status as co-conspirators does not broaden their rights under the Fourth Amendment. The fact that respondents acted in league with each other to accomplish the ends of the joint venture is irrelevant to the question whether they had a Fourth Amendment interest in Arciniega's freedom of movement that was infringed when Officer Fifer pulled him over on the highway. A defendant's role in a conspiracy has no generative force so as to create a privacy interest that does not otherwise exist.

The court of appeals sought to evade a direct confrontation with the well-settled principle that Fourth Amendment rights may not be vicariously asserted, by

limiting its joint venture exception to defendants whose roles in the conspiracy show that they had supervision and control over the joint venture. See App., *infra*, 14a-16a; see also *United States* v. *Taketa*, 923 F.2d 665, 672 (9th Cir. 1991) (noting that granting Fourth Amendment standing to defendants who had no ownership or control over the items seized would create "a true coconspirator exception of general applicability"); *United States* v. *Kovac*, 795 F.2d 1509, 1510-1511 (9th Cir. 1986), cert. denied, 479 U.S. 1065 (1987). Thus, the court of appeals focused on each respondent's role in the conspiracy, and granted or denied standing based on his or her level of involvement or supervisory status in the scheme. See App., *infra*, 12a-16a. Because the Simpsons and Xavier Padilla were "critical player[s]" (*id.* at 12a) in the joint venture, with "supervisory role[s]" (*ibid.*) that called for their "substantial control and oversight" over the criminal enterprise (*id.* at 13a), the court found that they had legitimate privacy interests that were invaded by the stop of Arciniega. With respect to Jorge and Maria Padilla, although they were "active members" (*id.* at 14a) who were an "integral part" (*ibid.*) of the criminal venture, the court found that it was unclear whether they "shared any responsibility" (*ibid.*) for the enterprise; accordingly, the court remanded for the district court "to determine whether they were responsible partners of the venture or mere employees." *Id.* at 15a. Finally, the court denied Warren Strubbe standing because he had "no active control or supervision over the drugs or the vehicle involved in this conspiracy." *Id.* at 16a.

This is entirely made up. Not only has the Ninth Circuit manufactured a complex, fact-intensive theory, that theory is beside the point. The fact that various

respondents exercised "control and oversight" over, and enjoyed "critical player" status in, a criminal venture that used the vehicle to accomplish its ends is irrelevant to the basic Fourth Amendment question—whether the police invaded any personal Fourth Amendment interest of any of the respondents when they conducted an investigatory stop of Arciniega.[3] By focusing on each respondent's role in the offense, rather than on whether each was the victim of an illegal search or seizure, the court of appeals erred.

b. The court of appeals based its standing decision with regard to Xavier Padilla and the Simpsons on their status as principals in the joint venture. It therefore did not decide whether there was any other ground on which they might have been accorded standing. For that reason, the decision below stands or falls on the viability of the Ninth Circuit's "joint venture" theory of standing.[4]

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[3] In addition to being inconsistent with this Court's decisions, the Ninth Circuit's doctrine creates perverse results. The more prominent a defendant's role in the underlying criminal venture, the more likely he is to benefit from a suppression order based on a search or seizure involving another member of the conspiracy. A kingpin in such an operation, like Xavier Padilla or the Simpsons, may therefore be effectively immunized from prosecution, while a relatively minor figure such as Strubbe is left to face the full brunt of the government's evidence.

[4] The court noted that the Simpsons' ownership of the vehicle was relevant to the Fourth Amendment analysis, but did not suggest that that factor alone was sufficient to give them standing. App., *infra*, 12a. No other respondent had any plausible Fourth Amendment interest at stake in the stop of Arciniega other than as a function of his or her participation in the conspiracy. Under Ninth Circuit law, as the district court noted, that was enough. See App., *infra*, 23a ("with respect to Xavier Padilla, Maria Padilla and Jorge Padilla,

In any event, once respondents' roles in the drug conspiracy are removed from the Fourth Amendment calculus, it is clear that none of the respondents had any Fourth Amendment interest that was invaded by the brief highway stop of Luis Arciniega. In particular, none of the respondents can claim that their Fourth Amendment rights were violated because of their interests in the cocaine or the Cadillac.

Even if respondents had a possessory interest in the cocaine, the brief investigatory stop of Arciniega did not interfere with that interest in any meaningful way. And once the police discovered the cocaine in the trunk of the car, their right to seize the contraband overrode any possessory interest respondents could be said to have in the drugs. See *Horton* v. *California*, 496 U.S. 128 (1990); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983); *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) ("Defendant's ownership of the bomb might give him standing to challenge such a seizure, but it would not establish its invalidity"), cert. denied, 423 U.S. 1078 (1976).[5]

Similarly, the temporary stop of Arciniega did not significantly interfere with any interest respondents had in the Cadillac. First, the Cadillac was searched pursuant to Arciniega's consent. Neither court below found that the consent to search was invalid. In-

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they get standing solely out of the joint venture aspect of it").

[5] We agree, of course, that if respondents had a legitimate expectation of privacy in the trunk of the Cadillac, they would not lose their ability to challenge the search of the trunk merely because it contained 560 pounds of cocaine. Their possessory interest in the cocaine, however, did not give them a privacy interest in the place where it was located. See *United States* v. *Salvucci*, 448 U.S. 83, 93 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980).

stead, the courts suppressed the cocaine because they held that the taint of the illegal stop extended to the search of the vehicle regardless of the validity of Arciniega's consent. Because none of the respondents' constitutional rights were violated by the illegal stop, none of them should be entitled to suppression of the cocaine on a "taint" theory. See *Wong Sun* v. *United States*, 371 U.S. at 492.

The three Padillas had no arguable privacy interest in the Cadillac that could have been affected by the stop or search of the car. They did not control the movements of the vehicle, and they had no power whatever to exclude others from its use. Even the Simpsons, who owned the vehicle,[6] suffered no Fourth Amendment injury when Arciniega was stopped. The temporary stop did not interfere in any meaningful way with their right to regain possession of the car from Arciniega, and nothing in the record indicates that they retained any right to exclude others from the trunk of the car or had prohibited Arciniega from consenting to a search of the vehicle that they had entrusted to him. The Simpsons have therefore failed to show how the stop of Arciniega violated any Fourth Amendment interest of theirs. See *Rakas* v. *Illinois*, 439 U.S. at 130-131 n.1 (defendant bears "burden of establishing that his own Fourth Amendment rights were violated").

2. The court of appeals' conclusion that respondents had standing because of their "joint control and supervision over the drugs and vehicle" arising from "active participation in a formalized business arrangement" to transport the drugs (App., *infra*, 14a)

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[6] Donald Simpson held title to the vehicle, and Maria Sylvia Simpson claimed an ownership interest based on her community property rights. See Resp. C.A. Br. 9.

conflicts with the law of every other circuit that has addressed the issue. With the exception of the Ninth Circuit, the courts of appeals have uniformly held that a defendant's participation in a joint criminal venture does not give him a protected Fourth Amendment interest in premises searched or property seized, if he would not otherwise have such an interest.

For example, in *United States* v. *Kiser*, 948 F.2d 418, 424 (8th Cir. 1991), cert. denied, 112 S. Ct. 1666 (1992), Kiser argued that the district court should have suppressed evidence obtained in the course of an unlawful stop and search of a car owned by one of Kiser's employees, who was using the car to transport cocaine on Kiser's behalf. The court of appeals held that Kiser did not have standing to object to the stop. The court noted the Ninth Circuit's "joint venture co-conspirator exception to the standing rules announced by the Supreme Court," 948 F.2d at 424, but declined to adopt that exception.

Similarly, in *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985), the district court granted five defendants standing to object to the search of a tractor-trailer truck. The district court's theory, like the court of appeals' theory in this case, was that the defendants had an interest in the drugs found in the tractor-trailer because the defendants were engaged in a joint venture that used the tractor-trailer for smuggling drugs. The court of appeals reversed, holding that the four defendants who were not present at the time of the search had not established a sufficient interest in the tractor-trailer to entitle them to challenge its search. The court held that the joint interest in the drugs did not confer standing: "The privacy interest that must be established to support

standing is an interest in the area searched, not an interest in the items found." 744 F.2d at 374.

The Eleventh Circuit similarly refused to recognize "joint venture standing" in *United States* v. *Brown*, 743 F.2d 1505 (1984). In that case, Brown hid cocaine on a co-conspirator's person. When the police searched the co-conspirator and found the cocaine, Brown moved to suppress it. The court of appeals rejected Brown's claim, holding that he did not have a Fourth Amendment interest in the personal integrity of his co-conspirator, even while his co-conspirator was transporting drugs belonging to both of them. 743 F.2d at 1507-1508. See also *United States* v. *Soule*, 908 F.2d 1032, 1036 (1st Cir. 1990) (rejecting "derivative standing" doctrine raised by defendant to challenge search of co-defendant's truck); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981) (defendant does not have standing to challenge search of a bag in the possession of his agents and co-conspirators); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976) (co-conspirators or co-defendants have no special rights under the Fourth Amendment, and a possessory interest in goods seized from another's property is insufficient to establish right to object to seizure), cert. denied, 431 U.S. 969 (1977); *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) (defendant, who gave bomb to friend to hold in trunk of his car until he asked for its return, did not have standing to challenge the search of the car; while he had standing to challenge seizure of the bomb, the seizure of the contraband did not violate the Fourth Amendment) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976).

Several courts have noted that the Ninth Circuit stands alone in its acceptance of "joint venture"

standing. See *United States* v. *Kiser*, 948 F.2d at 424 (noting and rejecting the Ninth Circuit's "joint venture co-conspirator exception to the standing rules announced by the Supreme Court"); *United States* v. *Gerena*, 662 F. Supp. 1218, 1245, 1247 n.30 (D. Conn. 1987) ("joint-venture standing" theory is "indistinguishable from the discredited co-conspirator and membership standing arguments"; the Ninth Circuit "stands by itself in its willingness to accept the viability of joint-venture standing"); *United States* v. *Schuster*, 775 F. Supp. 297, 305 (W.D. Wis. 1990) (Ninth Circuit's recognition of standing based upon a "formalized arrangement" is "in direct conflict" with Seventh Circuit law).

Seven years ago, we sought review of the same question, and the Court granted certiorari. *United States* v. *Quinn*, 751 F.2d 980 (9th Cir. 1984), cert. granted, 474 U.S. 900 (1985), cert. dismissed, 475 U.S. 791 (1986). After briefing and argument, the Court dismissed the petition, apparently concluding that the case was a poor vehicle for resolving the issue of joint venture standing.[7] This case, however, presents the issue cleanly. The conflict over the validity of "joint venture standing" has persisted. The Ninth Circuit's rule continues unjustifiably to impede law enforcement efforts in that region. Accordingly, this Court's review is warranted.

[7] The defendant in *Quinn* was the owner of a boat that was seized and later searched. The Ninth Circuit held that, despite his lack of presence at the events in question, the defendant could contest the validity of the boat's search on the basis of the joint venture theory. See *United States* v. *Quinn*, 751 F.2d 980 (1984). At oral argument in this Court, however, the question was raised whether the defendant's ownership of the boat was sufficient to permit him to contest the initial seizure without reference to the joint venture doctrine. Tr. of Oral Argument 19-25, *United States* v. *Quinn*, No. 84-1717 (argued March 5, 1986). After argument, the case was dismissed with two Justices dissenting. See 475 U.S. 791 (1986).

This case does not present the factual difficulties the Court apparently perceived in *Quinn*. Although the Simpsons had an ownership interest in the Cadillac, that interest was not affected by the stop of Arciniega. In any event, no other respondent had any proprietary interest in the car; each of those respondents is entitled to standing, if at all, only through participation in the criminal conspiracy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-10311

D.C. No. CR-89-0408-RMB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

XAVIER V. PADILLA; MARIA JESUS PADILLA, aka SUZY; JORGE PADILLA; DONALD LAKE SIMPSON; WARREN STRUBBE; MARIA SYLVIA SIMPSON, DEFENDANTS-APPELLEES

No. 90-10316

D.C. No. CR-88-0317-RMB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

XAVIER V. PADILLA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, Chief District Judge, Presiding

Argued and Submitted
September 19, 1991—San Francisco, California
Filed April 1, 1992

Before: Herbert Y.C. Choy, Arthur L. Alarcon and Thomas G. Nelson, Circuit Judges

Opinion by Judge T.G. Nelson

OPINION

T.G. NELSON, Circuit Judge:

The United States appeals an order of the district court holding that the defendants had standing to bring a motion to suppress, that there was no reasonable suspicion for the stop of a vehicle, and that the doctrines of attenuation and independent source are not applicable to this case. We affirm as to three of the defendants, remand for further proceedings for two others and reverse as to the last.

I. FACTS

On September 26, 1989, an Arizona trooper, Officer Russell Fifer, observed a 1976 Cadillac traveling westbound on the interstate. The officer noted that the vehicle appeared to be traveling slightly in excess of the speed limit (65 m.p.h.), although he admitted that the vehicle's speed was not excessive and that he would not have pulled over the vehicle for that speed.

At the suppression hearing, Fifer testified that the driver acted suspiciously. Upon noticing the officer, the driver jerked his head and stiffened. He passed

the patrol vehicle and continued to view him through the side view mirror.

Fifer followed the vehicle for approximately eleven miles and testified that during this time the vehicle slowed down, traveling speeds that varied from 50 to 60 miles per hour. The officer radioed in the license plate number of the vehicle and was initially informed that the license plates belonged to a Pontiac, not a Cadillac. There was confusion regarding the plates but ultimately it was determined at the scene that the plates were, in fact, correct. Fifer testified, however, that the basis for his decision to stop the vehicle was not the possibility of the fictitious plate. Rather, he stopped the vehicle for driving at a speed he decided was too slow.

The officer testified that he believed he could stop a vehicle for driving at a slow speed if he believed the speed was not "reasonable and prudent." Fifer testified that he routinely issued both citations and warnings to travelers driving significantly slower than the posted limit. The defense introduced evidence that there is no posted minimum speed limit on the stretch of interstate where the vehicle was stopped.

Having pulled over the Cadillac, the officer questioned the driver, Luis Arciniega. Arciniega produced a valid driver's license and proof of insurance demonstrating that a customs official, defendant Donald Simpson, owned the Cadillac.

Another Department of Public Safety (DPS) officer, Robert Williamson, appeared on the scene. Both officers believed that Arciniega matched a drug courier profile. Accordingly, they requested and received Arciniega's consent to inspect the vehicle whereupon they discovered 560 pounds of cocaine concealed in the trunk.

The timing between the actual arrest and the resolution of the license plate mix-up is close. Fifer testified that the problem with the plates had been cleared up by 11:46 a.m. and that the arrest occurred at 11:50 a.m. Williamson's testimony confirms that the search of the trunk was not conducted until after the officer had learned of the license plate error.

Following the search, a third officer, Vanderpoole, was dispatched to the scene. Vanderpoole informed Arciniega that "[h]e was looking at at least twenty five years in prison; and since he was 50, he might not make it out of prison." Vanderpoole assured Arciniega that if he assisted the police, however, they would not file charges against him with the county attorney. Not surprisingly, Arciniega promptly agreed to cooperate. After a brief interrogation, it became apparent that Arciniega was merely a courier or "mule," carrying the load for other yet unidentified conspirators and the officers set out to apprehend Arciniega's "employers." DPS took Arciniega, the vehicle, and a portion of the cocaine to the Regal 8 Motel in Tempe where he was instructed to telephone his contact. He called what turned out to be the home of Alicia Padilla Romero, the sister of defendants Jorge and Xavier Padilla.

He spoke with apparent familiarity to an individual identified only as "Pollo" who promised to dispatch a runner to retrieve the load at the motel. Jorge Padilla and Maria Jesus "Suzy" Padilla, arrived at the motel in a white sedan. Jorge attempted to start the Cadillac while Maria began pulling the sedan out of the parking lot. DPS surrounded both vehicles and both defendants were immediately arrested. The officers found a rental contract in the white sedan bearing the name of Xavier Padilla, the brother of Jorge and husband of Maria.

Following a lead from Maria, the investigators proceeded to Alicia Padilla Romero's house. While they were questioning Alicia, Xavier Padilla entered the residence. He indicated under questioning that he had been staying with Alicia only temporarily and did not directly implicate himself. The officers did not arrest Xavier at that time and in fact did not do so until January of the following year.

The following day, however, DPS informed the U.S. Customs Service that Customs Inspector Simpson's automobile was involved in a drug seizure. Customs agents and DPS investigators interrogated Luis Arciniega who further implicated Simpson. As a direct result of Arciniega's statements, a search warrant was issued on Simpson's home which resulted in the recovery of incriminating evidence implicating both Simpson and his wife, defendant Maria Sylvia Simpson.

On October 6, 1989, agents from the Customs Department, DEA and the Arizona Department of Public Safety all met with government counsel and agreed to cooperate and exchange information. This meeting is documented in an internal memorandum from the Customs Service and confirms that DPS information had been incorporated into all federal investigations which were commenced after the drug seizure.

Meanwhile, on October 12, 1989, in an apparently unrelated incident, Guillermo Owen was arrested in Sierra Vista, Arizona, for possessing a small amount of cocaine and paraphernalia. In an attempt to cut a deal, Owen offered what he knew about Arciniega's arrest a few weeks earlier. Owen discussed at length his involvement with Luis Arciniega, Arciniega's son Frank, defendant Warren Strubbe and various other players. From the DEA report evidencing the inter-

rogation, it appears that he did not, however, provide information regarding Mrs. Simpson, Jorge or Maria Padilla. Furthermore, the report only makes two brief references to Xavier and one to an unidentified customs official, presumably, Donald Simpson.[1]

Owen stated that he helped Strubbe and the Arciniegas unload about half of a large but unspecified amount of cocaine from a white and red Cadillac into Strubbe's Tucson apartment. A short time later, Arciniega departed with the remaining cocaine still in the Cadillac. Owen stated that he, Frank Arciniega and Strubbe delivered the cocaine from Strubbe's apartment to a storage facility rented by a Troy Barlous. After interrogating Owen and obtaining additional information, the DEA agents were issued a search warrant for the storage unit and uncovered 440 pounds of cocaine.

After a thorough reading of the record which includes reports from Customs, DEA, and the Arizona Department of Public Safety, an overall picture emerges. Xavier Padilla and the Simpsons were not drug merchants but were in the business of transporting contraband across the border for those that were. The seized cocaine was apparently owned by a cartel known as the "El Tejano" organization. Both Xavier Padilla and Sylvia Simpson had previously

[1] The reference in the DEA Report of Investigation dated October 17, 1989, are as follows: (1) "OWEN stated Frank [Arciniega] received a telephone call and informed OWEN that it was from Javier PADILLA in California who informed him that Louis had been arrested with the load of cocaine and had fingered him, (2) "OWEN stated that on 10-14-89, he was in the exercise yard with Louis Arciniega. OWEN stated that Louis told him that if Javier (PADILLA) did not take care of him and his family, he (Louis) would tell about the Customs guy that was involved with him."

met with these people in Mexico and had successfully delivered three other loads. Jorge and Maria Padilla were possibly mere "employees" of the conspiracy and were under the direct supervision of Xavier.

Warren Strubbe was not a member of the transportation conspiracy responsible for the load seized from the illegal stop. According to Owen, Strubbe came in contact with the seized cocaine but did so only briefly. Instead, he participated in a separate conspiracy involving a separate load. While apparently the cocaine was initially combined, it had been divided and Strubbe's share parted ways with the confiscated load before the stop of Arciniega. Strubbe's connection with the seized load ended at the point of division.

II. PROCEEDINGS BELOW

The district court determined that there was no founded suspicion for the stop of the vehicle. The government does not appeal this issue nor will we address it. The government does appeal, however, the district court's conclusion that all of the defendants had standing to contest the illegal stop and seizure of the cocaine found in the Cadillac even though none was present at the stop and only the Simpsons owned the vehicle. The court ruled that because they all exhibited sufficient control and supervision over the contraband, they could claim a legitimate expectation of privacy in the vehicle searched and the contraband seized.[2] The district court said:

[2] The term "standing" is used when discussing who may assert a particular Fourth Amendment claim. "Fourth amendment standing is quite different, however, from the 'case or controversy' determinations of Article III. Rather it is a matter of substantive fourth amendment law; to say that a

> I think it is clearly a joint venture and even though it is a joint venture for transportation, as distinguished from ownership, it was a joint venture that had control of the contraband.

The court further found that the stop "clearly led to the subsequent activities of the day when the car was delivered to Tempe; that without that stop, there would not have been any involvement by the DPS, nor would they have informed Customs and DEA about that." The government now appeals the suppression of the seized evidence. We affirm the district court's suppression with respect to Xavier Padilla and Donald and Sylvia Simpson, but we have insufficient facts before us to determine whether Jorge and Maria Padilla had a legitimate expectation of privacy and remand for additional findings of facts regarding them. We further hold that Warren Strubbe has not demonstrated sufficient standing and reverse the district court's decision as to his claim. Because we reach differing conclusions as to the various defendants, their positions will be discussed separately.

III. DISCUSSION

STANDING

Standard of Review

Mixed questions of law and fact are generally reviewed *de novo* although the clearly erroneous standard applies if the necessary analysis is primarily factual in nature. *United States v. McConney*, 728 F.2d 1195, 1202-1203 (9th Cir. 1984) (en banc).

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party lacks fourth amendment standing is to say that *his* reasonable expectations of privacy have not been infringed." *United States v. Taketa*, 923 F.2d 665, 669 (9th Cir. 1991) (citing *Rakas v. Illinois*, 439 U.S. 128, 139-140 (1978)).

Issues of standing are generally reviewed *de novo*. *United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). The district court's factual findings on the issue of standing must be accepted unless clearly erroneous. *United States v. Broadhurst*, 805 F.2d 849, 851 (9th Cir. 1986).

1. The Simpsons and Xavier Padilla

As we will explain, the Simpsons and Xavier Padilla have established a legitimate expectation of privacy. The government challenges their standing because none of the defendants was present at the time of the arrest nor exhibited physical control of the vehicle or contraband. The Simpsons base their standing not only on their ownership of the car but also because they engaged in an organized effort to transport the contraband. Xavier Padilla argues that his ultimate responsibility for the load and the facts resulting from that role confer standing.

To contest the legality of a search and seizure, the defendants must establish that they had a "legitimate expectation of privacy" in the place searched or the property seized. *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978). "Neither ownership nor presence are required to assert a reasonable expectation of privacy under the Fourth Amendment." *United States v. Johns*, 851 F.2d 1131, 1136 (9th Cir. 1988); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam). Instead, we have consistently held that a coconspirator's participation in an operation or arrangement that indicates joint control and supervision of the place searched establishes standing. *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991); *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984) (per curiam), *cert. dismissed*, 475 U.S.

791 (1986); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984).

In ruling that the all defendants had standing, the district court determined that they were clearly participants in a joint venture. The defendants were "involved in the joint control over a very sophisticated operation involving ownership in Mexico or Colombia, [and] transportation aspects of the business [were] controlled by these people, and I think under those circumstances they have standing." With respect to these three defendants, we agree. Not only was there a formal arrangement for the transportation, the defendants shifted responsibility for the contraband between each other at various stages of the relay.

Our case law "is far from clear on the question of what a formal arrangement for joint control actually means. . . . We engage in fact-specific analysis that includes consideration of the degree of cooperation and the respective possessory interests asserted." *United States v. Taketa*, 923 F.2d 665, 671 (9th Cir. 1991). In so doing, we examine the totality of the circumstances to determine if the defendant's legitimate expectations of privacy were violated. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

For example, in *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983), *rev'd on other grounds*, 469 U.S. 478 (1985), two pilots who had already offloaded the contraband enjoyed standing to contest the search of a truck and seizure of the marijuana. Their standing was based on the fact that they "shared a bailor/bailee relationship" with the defendants who had possession of the drugs and were present during the search. *Id.* at 1099-1100. The pilots owned the

marijuana but never argued that they owned nor controlled the vehicle that was searched. It was their formalized arrangement and possessory interest in the drugs which gave them a legitimate expectation of privacy. *See, e.g., United States v. Quinn*, 751 F.2d 980, 981 (9th Cir. 1984) (absent defendant had standing to contest search because he owned the boat searched and had a possessory interest in the marijuana seized); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984) (defendant exercised "joint control" over drug laboratory in his friend's house); *United States v. Perez*, 689 F.2d 1336, 1337-38 (9th Cir. 1982) (per curiam) (defendants who accompanied vehicle could contest seizure of drugs from truck driven by coconspirator); *United States v. Davis*, 932 F.2d 752, 757 (9th Cir. 1991) (defendant who had key to another's apartment, could come and go as he pleased, and stored items in a locked safe for privacy held to have standing); *United States v. Robertson*, 606 F.2d 853, 858 n.2 (9th Cir. 1979) (overnight guest had standing to assert Fourth Amendment violation in search of his possessions).

In fact, "[i]n virtually every case applying the coconspirator exception, the party granted standing to contest the search of another's property himself had an ownership interest in seized or searched property." *United States v. Taketa*, 923 F.2d 665, 671 (9th Cir. 1991). In *Taketa*, the court rejected the defendant's standing argument because he asserted no ownership interest in the items seized. We recognize that the defendants here did not *own* the contraband in the strict sense that the *Johns* defendants did. Nevertheless, they held a possessory interest in the same sense that the proprietors of a delivery service would possess a package.

Accordingly, the Simpsons and Xavier Padilla had standing not simply because the Simpsons owned the car and jointly possessed the drugs with Xavier but also because they participated in the organization, particularly on the day of the stop. Simpson, himself, was directly involved in the scheme. Obviously, his greatest asset to the conspiracy was his status as a customs official and his ownership of the car which avoided a search of his vehicle at the border. This, combined with evidence found at his home and the telephone records linking his customs station to the Padilla home and to a number in Agua Prieta, Mexico, supports the district court's finding that he had a coordinating and supervisory role in the operation. He was a critical player in the transportation scheme who was essential in getting the drugs across the border. Simpson established standing.

His wife, Maria Sylvia Simpson, arranged for the pickup of the drugs in Mexico and travelled across the border, keeping contact with the load.[3] It appears that she provided a communication link between her husband, Xavier Padilla, and the El Tejano people.[4] She held a supervisory role tying everyone

[3] Neither Simpson can establish standing solely by the conduct of his or her spouse. *See Kovac*, 795 F.2d at 1511 (a defendant could not assert standing by claiming he had a right to exclude others from access to his wife). They need not claim such an interest, however. Both exercise independent ownership of the vehicle and supervision or control over the drugs or participation in the operation. Moreover, their joint participation in the venture is one more factor contributing to the totality of the circumstances. *See Id.* at 1510, 11.

[4] In his statement to the DEA, Xavier Padilla described the final meeting between himself, Sylvia and Oscar Monge, the contact with "El Tejano" who has sometimes been individually been referred to by that name. In this meeting, Sylvia

together and overseeing the entire operation at least from the Mexico end. To continue with the delivery service analogy, she was the manager of the pickup point. Consequently, she also has established an expectation of privacy.

Xavier Padilla, for his part, exhibited substantial control and oversight with respect to the purchase in Mexico and primarily, the transportation through Arizona. DEA Agent Plover testified to the Grand Jury that he believed that Xavier Padilla probably had ultimate responsibility for the contraband on the day of the stop. Xavier indicated to the agent that it was he who was on the other end of the line when Arciniega called from the motel to make arrangements for pickup. Furthermore, he was participating in the negotiations with Mrs. Simpson and Oscar Monge in Agua Prieta. He had a possessory interest in the drugs equal to that of Mrs. Simpson and exhibited an equal degree of responsibility. It is inconsequential that he was not present at the stop nor that he was unable to exclude others from inspecting the vehicle. *See Johns*, 707 F.2d at 1100; *Perez*, 689 F.2d at 1338. Finally, as the man in charge, he sent his wife and brother to retrieve the load and was the principal contact with the "client," reflecting an overall responsibility to receive the drugs.

The complex relationships among these three defendants demonstrate that they were engaged in a sophisticated operation. Joint control can be established where the defendants were actively involved in

complained to Monge that she had not been paid for the previous three loads that she had "crossed" from Agua Prieta to Douglas, Arizona. Monge assured Sylvia that he would pay her for all deliveries after she had crossed the fourth and final load. At that point, Sylvia acquiesced and agreed to deliver the last load.

a formal arrangement for transportation. *Quinn*, 751 F.2d at 981. The fact that the defendants in this case insulated themselves from the mule, Arciniega, is an example of their sophistication. Previously, we have considered efforts to avoid detection as one more factor demonstrating a reasonable expectation of privacy. *See Pollock*, 726 F.2d at 1465 (defendant's participation in relocating methamphetamine lab to avoid detection demonstrated expectation of privacy). We hold, therefore, that because Xavier Padilla and Donald and Maria Simpson have demonstrated joint control and supervision over the drugs and vehicle and engaged in an active participation in a formalized business arrangement, they have standing to claim a legitimate expectation of privacy in the property searched and the items seized.

2. Jorge and Maria Padilla

Jorge and Maria Padilla argue that they are entitled to standing primarily because they were active members of a formalized business arrangement on the day they attempted to retrieve the cocaine. It is evident that they were surrogates of the organization intending to retrieve the cocaine for their apparent superiors. They did not control the drugs yet they were an integral part of the formalized business arrangement that did. *See United States v. Broadhurst*, 805 F.2d 849, 851-52 (9th Cir. 1986) (codefendants distributed responsibilities for marijuana cultivation and processing cocaine, evidencing formalized business arrangement). It is not clear from the record, however, if they shared any responsibility for the enterprise. Xavier told the DEA that Jorge and Maria were following his orders when they arrived at the Regal 8 Motel. They intended to become the subsequent leg in the transportation scheme and

would have held much the same bailee status as Luis Arciniega, only closer by blood and proximity to the boss. This, in and of itself, is not enough to confer standing. *See United States v. Aikens*, 946 F.2d 608, 613 (9th Cir. 1990) (crew member had no standing to challenge search of vessel). On one end of the spectrum we have Luis Arciniega, a pawn working for a wage, on the other end we have the Simpsons and Xavier Padilla who were running the show. Jorge and Maria fall somewhere within these extremes but as the record now stands, we cannot determine where.

Xavier acknowledged in his statement to the DEA that Jorge and Maria knew what they were doing when they went to the motel. This does not necessarily evidence responsibility in the joint venture, however. Additionally, while their familial relationship with Xavier adds to the totality of the circumstances test by demonstrating their personal connection with Xavier, it does not confer standing by itself. *See Kovac*, 795 F.2d at 1511. On remand, we ask the district court to determine whether they were responsible partners of the venture or mere employees in a family operation.

3. Warren Strubbe

The above analysis discusses an ongoing relationship among defendants and a variety of actions on the day of the stop demonstrating active participation in a transportation scheme. By contrast, Strubbe was noticeably absent from the day's events and can only argue that he was a passive participant in the larger conspiracy. The mere involvement in a conspiracy does not, by itself, suffice. *United States v. Toliver*, 433 F.2d 867, 869 (9th Cir. 1970), *cert.*

denied, 401 U.S. 913 (1971). To hold that Strubbe had standing when he was only a participant in the larger criminal conspiracy, would be to create a "true coconspirator exception of general applicability." *Taketa*, 923 F.2d at 672. We concluded in *Taketa* that such an exception to *Rakas* which would provide standing for any person accused of criminal conspiracy would be in clear contravention of holdings of the Supreme Court and this circuit. *Id.* (citing *Alderman v. United States*, 394 U.S. 165, 172 (1969)); *United States v. Turner*, 528 F.2d 143, 164 (9th Cir.), *cert. denied*, 423 U.S. 426 (1975)). Strubbe did not monitor the load, prepare to retrieve it, nor did he own the vehicle transporting it. In fact, he is part of a wholly separate illegal effort involving the cache in the storage unit. When Luis Arciniega drove away with the cocaine that was ultimately seized, Strubbe no longer had any control or apparent interest in the contraband or his conspiracy to deliver it. *See United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir.) (defendant abandoned expectation of privacy by turning heroin over to conconspirator and by not following when coconspirator drove away with the heroin in his trunk), *cert. denied*, 469 U.S. 1035 (1984).

His limited contact differs markedly from the others who aided transportation, monitored the drugs or claimed possessory interests in the seized drugs, the vehicle, or both. *See Perez* 689 F.2d at 1338. Consequently, Strubbe cannot claim standing because he has demonstrated no active control or supervision over the drugs or the vehicle involved in this conspiracy.

SUPPRESSION

Factual findings during a suppression hearing are accepted unless clearly erroneous. *United States v. Echegoyen*, 799 F.2d 1271, 1277 (9th Cir. 1986). Whether evidence resulting from an illegal stop is sufficiently tainted to require supression is a mixed question of law and fact that we review *de novo*. *United States v. Johns*, 891 F.2d 243, 244 (9th Cir. 1989); *United States v. Limatoc*, 807 F.2d 792, 794 (9th Cir. 1987).

The district court determined that the stop was unreasonable and that all subsequent information compiled that day would not have been discovered without it. The court based its ruling on *United States v. Johns*, 891 F.2d 243 (9th Cir. 1989). In *Johns*, the court stated:

> Our court has considered the question in terms of the substantiality of the taint. "'[I]f the illegally obtained leads were so insubstantial that their role in the discovery of the evidence sought to be suppressed 'must be considered *de minimus*, then suppression is inappropriate.' . . . In *Bacall*, the court emphasized that it was not using just a "but for" test, but was inquiring whether the illegally obtained evidence "tended significantly" to direct the investigation toward the evidence in question.

Johns, 891 F.2d at 245 (quoting *United States v. Bacall*, 443 F.2d 1050, 1056 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971) (quoting *Durham v. United States*, 403 F.2d 190, 196 (9th Cir. 1968) (internal citations omitted))).

Here, the impetus behind the DEA and Customs investigations was clearly the stop of Arciniega. The

documents before the district court indicate that the reason for the investigation of Simpson was because his vehicle was apprehended in a drug seizure.[5] Two of the Padillas were arrested directly from the telephone call from the motel. Xavier Padilla was immediately implicated as a direct result of the seizure. The illegal stop was the sole reason for discovering the drugs and these defendants. The exploitation of the primary illegality could hardly be more direct. *See Johns*, 891 F.2d at 245. *See also United States v. Chamberlain*, 644 F.2d 1262, 1269 (9th Cir. 1980), *cert. denied*, 453 U.S. 914 (1981).

The Government argues, however, that Arciniega's cooperation separated his information from the illegal arrest. It is well settled that even "granting [the] establishment of the primary illegality," if the prosecution can demonstrate that the evidence was obtained independently, the primary taint has been purged. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

It was held in *United States v. Ceccolini*, 435 U.S. 268, 276 (1978), that a living witness's testimony or information will not purge the taint when the testimony was not of the person's free will. The Court cautioned, however, that before live witness testimony or, in this case, information, as opposed to tangible evidence, will be suppressed, a "closer more

[5] The Report of Investigation prepared by the United States Customs Service indicates that Simpson was identified as a possible coconspirator only after a meeting with DPS following the seizure. Moreover, this memorandum, prepared October 18, 1989, substantiates that agents from Customs, DTA, DPS and the U.S. Attorney's office intended to integrate their efforts and based their investigation on the information supplied by DPS.

direct link between the illegality and . . . testimony is required." *Id.* at 278.

We find such a direct link here. First, we recognize the heavy weight upon a man's shoulders who has just been arrested with hundreds of pounds of drugs in the car he was driving. The significance of this pressure is critical not just for its emotional impact but because we previously have studied the amount of time that elapsed between the illegal search and the questioning. *United States Ramirez-Sandoval*, 872 F.2d 1392, 1397 (9th Cir. 1989). The discovery of the cocaine and the questioning of Arciniega were virtually simultaneous events.

Secondly, we are persuaded by the fact that the identities of the defendants would not have been known without the seizure and subsequent questioning of Arciniega. In *Ramirez-Sandoval*, we noted that "the identity of the witnesses and their relationship to the defendants were not known to the policemen and would not have been discovered in the absence of the illegal search." *Id.* at 1398 (citing *United States v. Rubalcava-Montoya*, 597 F.2d 140, 143-44 (9th Cir. 1978) ("here there is no indication that the connection between the crime and the witnesses would have been discovered from a source independent of the illegal search") (citations omitted)).[6] Also, as in *Ramirez-Sandoval* and *Rubalcava-Montoya*, there is no indication that the informant would have come forward of his own accord. In fact, it would have been ludicrous to suggest that he would. We stated in *Ramirez-Sandoval*, "[o]n the contrary,

[6] See also *United States v. Scios*, 590 F.2d 956, 963 (D.C. Cir. 1978) (en banc) (*Ceccolini* distinguished because the government only learned of the potential witness after illegally searching the defendant's files).

[the witnesses] had every incentive not to do so because they participated in the illegal activity." 872 F.2d at 1398.[7]

We conclude that Arciniega's cooperation was the direct result of his arrest and his position as a putative defendant. His "roadside deal" was too inextricably linked to the seizure and too closely related to the discovery of the defendants to purge the taint. Therefore, the district court properly suppressed all evidence seized based on the illegal stop against the Padillas and Simpsons.[8]

The Government argues that Guillermo Owen's statements should not have been suppressed and we agree. Although he only incriminated Xavier Padilla and Donald Simpson marginally, Owen was the kind of independent source that will be separated from the primary illegality. Over two weeks elapsed before he talked to the DEA about the illegal stop. He came forward independently to extricate himself from a wholly unrelated drug arrest. "Where police misconduct did not induce the witness' cooperation, the testimony will not be suppressed even though the unreasonable intrusion was one step in a series of events that led to the witness testifying." *United States v. Hooten*, 662 F.2d 628, 632 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982). His statements are distinguishable from Xavier Padilla's because the latter was arrested as the result of the investigation which flowed from the illegal stop. In Padilla's case, the seizure played the critical role in his decision to cooperate with the DEA. *See United States v. Leonardi*, 623 F.2d 746, 752 (2d Cir.), *cert. denied*, 447 U.S. 928 (1980).

[7] This court has never adopted a per se rule limiting *Ceccolini* to "good citizen" witnesses who testify "out of a sense of civic duty," nor do we do so now. *Ramirez-Sandoval* at 1398 (quoting *United States v. Hooton*, 662 F.2d 628, 633 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982). We still adhere to an analysis that looks to the incentive behind a person's decision to come forward when discussing the attenuation determination.

[8] The entire coordinated investigation was based solely on the illegal stop of Arciniega. Consequently, with the exception of Owen's statements which while derivative, came independently into the hands of the investigators, all evidence before the district court was properly suppressed. This includes evidence recovered in the Simpson home as well as the post-arrest statements made by Xavier Padilla and Luis Arciniega.

IV. CONCLUSION

With respect to standing, we hold that the district court's factual findings pertaining to Donald Simpson, Maria Sylvia Simpson and Xavier Padilla were not clearly erroneous and that its applications of law were correct. We further hold that it properly suppressed evidence seized from the vehicle driven by Luis Arciniega or obtained directly because of the stop. We remand to the district court for further findings of fact as to Jorge and Maria Padilla because we are unable to determine their degree of responsibility. If it is ultimately determined that they had standing, the suppression analysis applies to them as well. Finally, we hold that the district court's finding that Warren Strubbe had standing was clearly erroneous. Consequently, we need not discuss the suppression issue with respect to him.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-89-408-T-RMB

UNITED STATES OF AMERICA, PLAINTIFF

vs.

XAVIER V. PADILLA, MARIA JESUS PADILLA, JORGE PADILLA, DONALD LAKE SIMPSON, WARREN STRUBBLE, MARIA SYLVIA SIMPSON, DEFENDANTS

May 8, 1990
9:00 o'clock a.m.

HEARING ON PENDING MOTIONS

Before THE HONORABLE RICHARD M. BILBY

* * * * *

[128] THE COURT: Well, it's the finding of the Court that under the circumstances in this case the parties do have standing to challenge the search. I think it is clearly a joint venture, and even though it was a joint venture for transportation as distinguished to a joint venture for ownership, it was a joint venture that had control of the contraband. Clearly they took it from one spot to another, from Douglas to Tucson, separated the load, took it on to another place in Tempe, they intended to have con-

trol over it. Clearly they had—Xavier Padilla had a supervising role over it, the two Simpsons owned the car; they had not given up their interest in the car; it was in the locked trunk of the car. And I think they have a [129] reasonable expectation of privacy there.

I think that with respect to Xavier Padilla, Maria Padilla and Jorge Padilla, they get standing solely out of the joint venture aspect of it. And I think that is clearly here. This isn't just a simple conspiracy, but they were involved in the joint control over a very sophisticated operation involving ownership in Mexico and Colombia, transportation aspects or the business controlled by these people, and I think under those circumstances they have standing. So I will allow them to contest it.

I would like to hear the testimony first from the arresting officers, so let's get going.

* * * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CRIMINAL MINUTES (Tucson-Globe Division)

Date: May 8, 1990

88/ 317/ 3

89/ 408/ 1-6

Yr Case# Dft#

U.S.A.

vs.

PADILLA, ET AL XAVIER V

HONORABLE RICHARD M. BILBY

[Filed May 16, 1990]

Proceedings: HEARING PENDING MOTIONS: Open Court

Counsel make statements to the Court. Witnesses sworn and examined, Exhibits marked and admitted.

ORDERED AS FOLLOWS:

* * * * *

Pursuant to Findings on the Record,

The Court finds that defendants have standing in the Motion to Suppress the search/seizure of co-defendant Arcinega in the Simpson vehicle.

* * * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-89-408-T-RMB

UNITED STATES OF AMERICA, PLAINTIFF

vs.

XAVIER V. PADILLA, MARIA JESUS PADILLA, JORGE PADILLA, DONALD LAKE SIMPSON, WARREN STRUBBLE, MARIA SYLVIA SIMPSON, DEFENDANTS

May 15, 1990
Tucson, Arizona

HEARING ON PENDING MOTIONS

Before THE HONORABLE RICHARD M. BILBY

* * * * *

[176] THE COURT: It's the finding of the Court that Officer Fifer did not have founded suspicion for making the stop, based upon the following facts: First, his report never states that a stop was based on the slow speed. There is nothing in the tape that indicates that.

Secondly, though he came in and testified here at trial to that, he says it was based on slow speed, and later the fictitious plates, and he specifically stated that it was a violation of state law, the slow speed, which I think the record clearly shows is not the fact.

While I don't believe he was lying, I cannot help but have his credibility drawn into question in light of the fact that I gave him a specific order not to do certain things, and he promptly went out and did them, that he had listened to the tape two or three times.

I don't know that that really changed his testimony any; otherwise, I would have stricken it. But it's just—it does bear on credibility.

[177] Further, at some point prior to the arrest, or the search, I should say, which then was followed by the arrest, he knew from some pretty good evidence that on the scene that the insurance certificate showed that the car and the license plate belonged together, and that would have at least required a further inquiry back to the dispatcher, which would have shown, as it did at some point in time, that the car and the license plate belonged to each other.

Now, he has testified that that took place after the arrest and the search. The time elements are pretty hard to come by. I'm not too sure that I would be happy basing a decision on that, but it is very clear that prior to the search he knew that the insurance certificate and the car belonged to each other.

And then, even assuming his testimony that—that they got permission to do the search, then found out later, I just don't feel a lot of credibility to that. I think the facts in the case would indicate that—that they had adequate knowledge prior to any search, that this car and the license plate belonged to each other.

MR. KERN: Your Honor, may I interrupt? I'm sorry.

With respect to that particular finding, I don't know if it will make any difference to whether or not you are going to rely on that finding, but on page

45 of the transcript, the question put to Mr. Fifer was:

[178] "And in addition, you had the license plate now associated with the Cadillac?

"Answer: Off of the insurance card?

"Question: No, sir."

And then the question is: "I'm sorry, you had the insurance card which identified the car as a Cadillac?

"Answer: Yes, sir.

"Question: And you had the name of the purported owner of the car on the insurance form?

"Answer: Yes."

So there was nothing at all having to do with the license plate number.

THE COURT: Thank you for pointing that out. I should correct myself. He did have the fact that the car—he had a description of the car such as the one there, and it was insured.

So that certainly should have been a red light to cause something, but the primary reason here is that we start out with one reason. We have police reports which say: I made a stop for one reason.

We come into trial and get an exactly opposite story about the stop as for speed. There is no state law on speed in this area. He should have known that, because this is his area.

And then we are faced with two differing [179] descriptions, and I specifically, after his direct testimony, tell him: Don't listen to the tapes, and he promptly decides to do it. For what reason, I don't know; maybe didn't hear me, but whatever it is, I think it bears crucially on his credibility in the testimony.

So the basis for the stop has to be, I think based, really, today, on what he said here as the speed. There is no law on the speed.

I have upheld searches, and I did very recently in a case involving another massive amount of cocaine, where a Border Patrol vehicle was parked off the highway, and on the interstate about 20 miles east of where this stop took place.

A truck came by at a place where everybody is going 65, 70 miles an hour, and the minute the truck sees the Border Patrol vehicle, it just stopped—not stopped, but it slows right down to 50 miles an hour, when the rest of the traffic continues on. There is no red light, there is no—nothing else.

They then pull out to look at him, and the person looks suspicious, and they pull the truck over and found 400-and-some pounds of cocaine hidden in the back of the truck in a false compartment.

I felt there that speed was a factor, because everybody is going very fast, and as soon as he sees the [180] Border Patrol officer he stops, when nobody else does. There is no red lights, there is nothing. And that's a place in the road where everybody is going lickety-split, and to just drop your speed like that is very suspicious.

This isn't that case. The man had a red light, he slows down for a red light, he speeds back up again, he just doesn't stay at one speed and then go up, he stays right at 50 miles an hour.

I think under those circumstances there just are not founded suspicion. You've got to have some basis to stop people.

And there is no question in my mind that—and I happen to think that is good police work, that when you stop somebody for a legitimate reason, it's perfectly proper to ask them: May we check your car? And you can always tell them no.

Now, I guess you've got to be worred about that, because where if you said yes, you might get a warning, and you say no, you might get a ticket, but that's not this case. The fact is, they ask, and that's perfectly all right. But we just don't get to that issue in this case.

So the motion to suppress the search of the Simpson vehicle being driven by Mr. Arcinega is granted.

I haven't given any thought, and I don't know if you have either, as to what status that puts us in. If you [181] would like to, we can go ahead, and I guess the next thing to do, really, is the motion to suppress statements or the Padillas.

* * * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CRIMINAL MINUTES (Tucson-Globe Division)

Date: May 15, 1990

88/ 317/ 03
89/ 408/ 1-6
Yr Case# Dft#

U.S.A.

vs.

PADILLA, ET AL XAVIER V

HONORABLE RICHARD M. BILBY

[Filed May 16, 1990]

* * * * *

Pursuant to Findings on the Record,
Court finds that Officer Fifer did not have founded suspicion to make the stop, therefore,

ORDERED, Motion to Suppress the Search of the Simpson Vehicle Driven by Arcinega is GRANTED.

* * * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-89-408-A-RMB

UNITED STATES OF AMERICA, PLAINTIFF

vs.

XAVIER V. PADILLA, MARIA JESUS PADILLA, JORGE PADILLA, DONALD LAKE SIMPSON, WARREN STRUBBLE, MARIA SYLVIA SIMPSON, DEFENDANTS

May 30, 1990
Tucson, Arizona

HEARING ON PENDING MOTIONS

Before THE HONORABLE RICHARD M. BILBY

* * * * *

[8] THE COURT: All right. Based on the statement of facts provided to me by the Government, it's my finding that the stop which the Court has previously suppressed clearly led to the subsequent activities of that day when the car was delivered to Tempe; that without that stop, there would not have been any involvement by the DPS, nor would they have informed Customs and DEA about that.

The Customs investigation flowed directly from the fact that from the news and from the law enforce-

ment they found out that a U.S. Customs' inspector's car had been involved in this.

[9] They went to Casa Grande, contacted Mr. Arcinega; he was arrested and they discussed things with him that they wouldn't have had, they would not have known about him, had it not been for the stop of Mr. Arcinega. From that they then received information which led them directly to the other defendants.

The DEA investigation clearly flowed from the same thing, because Agent Sprout called Agent Grabowski and said that he had received information that had come from an informant regarding a recent cocaine seizure, and someone by the name of Arcinega.

Had there not been the stop, it is clear that none of that would have ever come about. It's not a "but-for" test, but it seems to me under the rulings in *U.S. versus Johns III*, 891 F.2d 243, the court talks about first whether or not it should be diminimus, and I find that it's diminimus, and stated that the court, quote, "In Bacall, the court emphasized: "It's not using a "but-for" test, but was inquiring whether the illegally-obtained evidence tended significantly to direct the investigation towards the evidence in question.' "

And I think that this statement makes it abundantly clear that is exactly what happened. So that under those circumstances I'm going to hold that they can't—it is not attenuated, and the motions to suppress will be granted.

* * * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CRIMINAL MINUTES (Tucson-Globe Division)

Date: May 30, 1990

88/ 317/ 03

89/ 408/ 1-6

Yr Case# Dft#

U.S.A.

vs.

PADILLA, ET AL XAVIER V

HONORABLE RICHARD M. BILBY

[Filed May 30, 1990]

Proceedings:

FURTHER HEARING PENDING MOTIONS: xx Open Court

Counsel make statements to the Court.

Based on the Statement of Facts provided to the Court by the Government, the Court finds that the stop, the Court previously suppressed, clearly led to the subsequent activities of that day when the car was delivered. Without the stop, there would not have been any involvement by the DES or information to DEA.

The customs investigation flowed directly from the fact that from the news and through law enforcement investigation, the customs department found

out that a United States Customs inspector's car was involved in the stop. Customs subsequently went to Casa Grande, Arizona, contacted Mr. Arcinega, the driver of the vehicle, and had discussions with him. Customs would not have known about Mr. Arcinega had it not been for the stop, the subsequent investigation and the information subsequently received which led directly to the other defendants.

The Drug Enforcement Agency investigation clearly flowed from the same stop, and subsequent information because agent Sproat contacted agent Grabowski to advise him that Sproat had information given him by an informant regarding a recent cocaine seizure with some named Arcinega.

Had there not been a stop, it is clear to the Court that none of this investigation would have transpired. Although this is not a "but for" test, under the rulings in *US v. JOHNS*, 891 F.2nd 243, the Appellate Court first speaks as to whether or not the identification is de minimis, and this Court finds, clearly it is NOT de minimis. In *US v. BACALL*, 443 F.2nd 1050, the Court emphasized that it was not using just a "but for" test, but was inquiring whether the illegally obtained evidence "tended significantly" to direct the investigation toward the evidence in question. This Court finds it abundantly clear that this is what happened, therefore,

Under the all of the circumstances previously noted, this Court finds that it is not attenuated and the Defendant's Motions to Suppress are hereby GRANTED.

* * * * *

/s/ Richard M. Bilby
RICHARD M. BILBY
United States District Court

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45472

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

92-207

UNITED STATES OF AMERICA

-V-

XAVIER V. PADILLA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR DONALD LAKE SIMPSON
IN OPPOSITION

Respectfully Submitted By:

(S) Donald Lake Simpson

DONALD LAKE SIMPSON
REG. NO#. 01766-196
U.S. BUREAU OF PRISONS
POST OFFICE BOX 33
TERRE HAUTE, INDIANA 47808

Respondent-Defendant, Pro Se

Maria Sylvia Simpson, Pro Se
Respondent-Defendant, Pro Se

(812) 238-1531

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Question Presented :

1. Whether membership in a joint venture to transport drugs gives co-consp--irators a legitimate expectation of privacy entitling them to challenge the in--vestigatory stop of one of the members of the conspiracy, and the subsequent search of the vehicle he was driving ?

Respondents' proposed answer is: Yes.

List Of Interested Parties :

1. United States Of America

2. Xavier V. Padilla

3. Maria Jesus Padilla, a/k/a Suzy

4. Jorge Padilla

5. Warren Strubbe

6. Maria Sylvia Simpson

7. Donald Lake Simpson

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA

V.

XAVIER V. PADILLA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR DONALD LAKE SIMPSON IN
OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 930 F. 2d 854.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1992. The jurisdiction of this court is timely invoked under 28 U.S.C. § 1254 (1), in that the petitioner's petition for a writ of certiorari was filed on or before July 30, 1992.

STATEMENT

After an indictment was returned in the United States District Court for the District of Arizona, which charged therein, the Respondents Simpson, his wife Maria Simpson and four other with conspiracy to distribute and possess

with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841 (a) (1), as well as charged respondent Xavier Padilla with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848, the District Court granted respondent's motion to suppress most of the above poisonous fruits of incriminating evidence obtained without prior judicial authorization or reasonable probable cause in violation of respondents' Constitutional privacy interests under the Fourth Amendment. The Ninth Circuit Court of Appeals affirmed the District Court's decision in part, vacated in part and remanded the matter with directions. The Goverment has now submitted a petition for writ of certiorari to review the lower courts' decision. This petition is submitted to oppose the Goverment's efforts before the Honorable Court and to ask that the lower courts' decision be summarily affirmed and that certiorari be denied.

PROCEDURAL HISTORY

On September 25, 1989, Arizona Department of Public Safety patrolman Russell Fifer stopped the car driven by Luis Arciniega. After officer Fifer received radio dispatched information that the license plate number purportedly affixed on the Cadillac driven by Arciniega was registered to a Pontiac, he signaled Arciniega to stop and Arciniega immediately pulled the car over. When officer Fifer walked up to the car he requested Arciniega's driver's license and the car registration. Arciniega gave officer Fifer his personal driver license and valid insurance card information on the Cadillac all reflecting the names of Donald Lake Simpson and Maria Sylvia Simpson.

Officer Fifer then requested a driver's license, warrant and another car registration check through the NCIC computer based upon that additional information and documentation. A police radio dispatcher immediately informed Off-

-icer Fifer that Arciniega had a valid driver's license, and that the initial license plate information provided him earlier was incorrect and that the lic-ense plate information given by him were in fact correct and registered to a Cadillac owned by the Respondents Donald and Maria Simpson.

By then, another Public Safety patrolman had arrived on the scene of the stop only moments earlier, and asked Arciniega if he minded if a search of the car is conducted. Arciniega responded, " The whole car ? " Without responding to Arciniega's responsive question, and without receiving Arciniega's actual or implied consent to search, the patrolman proceeded to search the glovebox and then placed the steering wheel in lock staus and removed the keys from the ignition and then proceeded to the rear of the car and opened the trunk with then, wherein he discovered the cocaine. Arciniega was immediately arrested and charged with suspicion of possession of a controlled substance. At that time no field test of the substance discovered was performed nor did the officers then apply for a search warrant to complete their search of the car.

After the above intercourse between Arciniega and Officer Fifer and other law enforcement officers, and receiving inculpatory statements resulting from custodial interrogation, Arciniega was then propositioned and he agreed to make a controlled delivery of the cocaine from that custodial setting. First, Arciniega and safety patrol officers set up operations from a motel in Tempe, Arizona. Second, shortly thereafter, Arciniega placed a telephone call to the residence of the Respondents Jorge and Maria Padilla requesting them to meet with him at that location. Shortly after arriving at the motel, the Padillas attempted to drive off in the Simpsons' Cadillac laden with " concrete bricks " previously substituted for the 560 pounds of cocaine and were arrested there on the scene. After being subjected to inherently coercive custodial interrogation by arresting officers, Maria Padilla succumbed and then led law enforcement

officers to a house which Exaier Padilla was staying and, he too, was arrested later and charged as one of the principals in a drug smuggling operation and conspiracy to distribute 560 pounds of cocaine.

Prior to trial, respondents filed a proper motion asking the court to suppress all evidence resulting from the warrantless and illegal search of respondent Simpsons' car Arciniega was driving when apprehended. Respondents all argued that they had recognizable standings to challenge the stop, search and seizure of the car Arciniega was driving, and that as a matter of law, it was wholly unreasonable, unauthorized and unlawful under the laws and Constit-ution of the United States. The District Court agreed and so ruled, based upon the particular evidence presented and developed at the suppression hear-ing, that respondents had equal standing to challenge the stop and search of the car and the resulting fruit discovered thereof, because the Goverment's evidence amply purported that respondents were all involved in " a joint ven-ture for transportation " of the discovered contraband, and that the joint venturers " had control of the contraband " at the time of the stop. Petit-ioner's Appendix at 22a.

In sum, the Goverment's evidence developed at the hearing clearly and forcefully demonstrated that [the] Public Safety Officers wholly lacked any reasonable suspicion or cognizable probable cause to either stop Arciniega or to even conduct the patently unreasonable search of the Simpsons' vehicle driven by Arciniega. Despite this legally flawed position, Petitioner maintain and argued at the hearing that the stop of the car was valid and that the sea-rch of the car was consensual. Respondents did not concede either point. The District Court agreed with respondents claims that Arciniega had not, and in fact, could not legally give the officers a valid consent to search the Simp-sons' car under the surrounding circumstances, and that the resulting search

was wholly unreasonable. In granting the respondents' Motion to suppress all evidence found in Simpsons' vehicle, the District Court found that there would not have been a prosecution by the Goverment in the absence of the il-legal stop and search of Arciniega and the car owned by the Simpsons. Petit-ioner's Appendix at 31a-32a, 33a-34a.

Petitioner appeals to the United States Court of Appeals for the Ninth Circuit and participated in oral argument on September 19, 1991. On April 1, 1992, the Ninth Circuit, without dissent, affirmed the District Court's sup-pression order as to respondents Xavier Padilla, Donald Simpson, and Maria Sylvia Simpson; and also remanded the case for further findings with respect to respondents Jorge and Maria Padilla; and additionally reversed as to the respondent Warren Strubbe.

In ruling on the standing issue in question by Petitioner herein, Honor-able Circuit Judge Nelson, speaking for the Court, correctly held that: (1) three defendants (the Simpsons and Xavier Padilla) involved in a formal arr-angement for transportation of drugs and with responsible positions in the venture had standing to challenge legality of search of vehicle, although they were not present at the time; (2) as to two other defendants (Jorge and Maria Padilla), it was necessary to determine whether they were responsible partners of the venture or merely employees in a family operation; * (3) a sixth defendant (Warren Strubbe), who was a passive participant in larger conspiracy, did not have standing; (4) courier's cooperation did not separate his information from illegal arrest, so that all evidence against the first three defendants based on illegal stop was properly suppressed; (5) state-ments by another person two weeks later should not have been suppressed.

* The Petitioner's Motion for Extention of Filing Time misstated the record that the court extended its ruling to all 6 defendants.

More specifically, the Ninth Circuit found that respondents Simpson and Xavier Padilla were entitled to challenge the stop and search of the Simpsons' car driven by Arciniega, and in doing so, relied upon a well-established line of Circuit precedents which granted Fourth Amendment standing to participants in a joint criminal venture who have asserted an interest in the place search-ed or the property seized by virtue of their purported membership in that joint venture. Petitioner's Appendix at 9a-11a. In these precise circumstance, the Court further found that the Simpsons and Xavier Padilla each had standing, " not simply because the Simpsons owned the Cadillac car and jointly possessed the drugs with Xavier, but also because they participated in the organization, particularly on the day of the stop. " Pet. App. at 12a.

It concluded that the unreasonable and unlawful stop and search of Arcini-ega and the Simpsons' car driven by him, amply justified the suppression of primarily all the evidence discovered thereunder, with the exception of the statements of Guillermo Owen who came forward more than two weeks after the stop and search in question and provided incriminating information against Xav-ier Padilla and Donald Simpson as a result of a wholly unrelated drug arrest. Additionally, Judge Nelson also affirmed the District Court's finding that re-spondent Warren Strubbe did not have standing to make a Fourth Amendment chal-lenge, and therefore did not even discuss the suppression issue with respect to him.

REASONS FOR NOT GRANTING THE PETITION

Petitioner erroneously contends inter alia that the decision of the court of appeals is inconsistent with basic tenets of Fourth Amendment Law, and that the fruits of Officer Fifer's stop, search and seizure of Arciniega and the Simpsons' car should not had been excluded as to respondents Simpsons and Xav-

-ier Padilla because the stop of Arciniega did not violate either of their per-
-sonal Fourth Amendment Rights. Further, that the Ninth Circuit's "coconspirator exception " is contrary to Fourth Amendment principles established by this Court, and that by focusing on each respondent's role in the criminal venture, rather than on whether each was the victim of an illegal search or seizure, the Court of Appeals erred. For those reasons, therefore, the decision below stands or falls on the viability of the Ninth Circuit's " joint venture " theory of standing. Re-
-spondent Simpson asserts that this Court has repeatedly found these arguments unpersuasive in legitimate substance as a matter of law and accordingly, has con-
-sistently rejected Petitoner's prior similar challenges made here. See, e.g., United States -V- Quinn, 751 F. 2d 980 (CA 9 1984), Certiorari granted, 474 U.S. 900 (1985), Cert. Dismissed, 475 U.S. 791 (1986), and its progeny; See also, United States -V- Johns, 707 F. 2d 1093 (CA 9 1983)("Joint venturers who exercised continuing control and a reasonable legitimate expectation of privacy in the place that was search have standing"). The Petitioner's legal position herein asserted is similarly flawed and warrants wholly no relief. The Ninth Cir-
-cuit, nevertheless, once again fully addressed and carefully determined these claims and found them meritless.

The Court held, after carefully and paintakingly examining the record evid-
-ence and the full body of governing law, specifically, that respondents Simpsons and Xavier Padilla had established a legitimate reasonable expectation of privacy to assert standing. The Court further found and reasoned that the respondents Simpson based their standing not only on their ownership of the car but also be-
-cause they had engaged in an organized effort to transport the contraband. The Court also made clear, however, that " neither ownership nor presence at the scene of crime were required to assert a reasonable expectation of privacy under the Fourth Amendment ", **citing United States -V- Johns, 851 F. 2d 1131, 1136 (CA 9 1988); United States -V- Perez, 689 F. 2d 1336, 1338 (CA 9 1982).** Instead,

we have consistently held that a coconspirator's participation in an operation or arrangement that indicates joint control and supervision of the place search-
-ed establishes standing, **citing United States -V- Davis, 932 F. 2d 752 (CA 9 1991); United States -V- Quinn, supra; United States -V- Pollock, 726 F. 2d 1456 (CA 9 1984).**

In discussing the standard of review of standing, the Ninth Circuit Court correctly held that the District Court's factual findings on the issue of stand-
-ing must be accepted unless clearly erroneous, **citing United States -V- Broad-
-hurst, 805 F. 2d 849, at 851 (CA 9 1986); United States -V- Kovac, 795 F. 2d 1509, 1510 (CA 9 1986), CERT. DENIED, 479 U.S. 1065 (1987).** In this critical aspect of the review process the petitioner has not and cannot seriously point out erroneous factual finding underlying the lower court's suppression order. "The Petitioner attempts to disregard the initial warrantless and unreasonable investigatory stop and search without a " reasonable " or " founded " suspicion of any criminal activity ", **United States -V- Greene, 783 F. 2d 1364, 1367 (CA 9), CERT. DENIED, 476 U.S. 1185, 106 S.Ct. 2923, 91 L.Ed. 2d 551 (1986),** and now seeks this Court's concurrence in not taking into full account the total-
-ity of that wholly unjustified illegal stop and search of the respondents' car, in absence of a reasonable suspicion of criminal activity, or distinguishable exception to the " fruit of the poisonous tree " doctrine. **Terry -V- Ohio,392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); United States -V- Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 694, 66 L. Ed. 2d 621 (1981).** Hence, Petition
-er's attempts to minimize and disregard these important factors by arguing that the fruits of Officer Fifer's stop of Arciniega should not be excluded as to re-
-spondents unless the stop of Arciniega violated their personal Fourth Amendment Rights, must be rejected based upon the above authority alone.

This Court has previously sent clear mandates down articulating what actions

constitutes a legally permissible warrantless investigatory stop [and] the level of cause necessary to justify the investigatory stop and search under the facts of this case. The Ninth Circuit has done likewise explaining that the requisite level of cause is a " reasonable " or " founded " suspicion of crimi--nal activity. **United States -V- Greene, supra, at 1367; United States -V- Corral- villavicencio, 753 F. 2d 785, at 789 (CA 9 1985).** Each of these decis--ions were direct offsprings of both **Terry -V- Ohio, supra,** and **United States -V- Cortez, supra,** the Court holding in **Cortez**, that " An investigative stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." **Id., 449 U.S. 411, at 417, 101 S. Ct. 690, at 694, 66 L. Ed. 2d 621 (1981).** In the instant case, Petit--ioner wholly failed to demonstrate any of the necessary factors of founded su--spicion to justify its opposition to the respondents' standing under the co--conspirator exception to challenge all resulting physicial evidence obtained from the illegal stop and search of respondents' car. This failure provides an additional bases why this Court must reject and deny Petitioner's request for a writ of certicrati in this case.

Additionally, the Fourth Amendment provides :

> **" The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized. "**

It is no question that the above right to security in person [and] pro--perty provides continuing protection against a vast array of arbitrarily and illegally conducted Governmental searches and seizures such as occurred in the instant case. A search compromises the individual interest in privacy; a seiz--ure deprives the individual of dominion over his or her person or property.

United States -V- Jacobsen, 466 U.S. 109, AT 113, 80 L. Ed 2d 85, 104 S. Ct. 1622 (1984); Mincey -V- Arizona, this Court unanimously left no doubt about the basic rule of Fourth Amendment jurisprudence applicable to the Petitioner's petition for a writ of certiorari. Honorable Justice Stewart speaking for the Court stated:

> " The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that " searches conducted outside the judicial process, without prior approval by judge or magistrate, are pre se unreasonable under the Fourth Amendment-- subject only to a few specifically established and well-delineated exceptions, " citing **Katz -V- United States, 389 U.S. 347, 357, 19 L. Ed 2d 576, 88 S. Ct. 507 (footnotes omitted); United States -V- Ross, 456, U.S. 798, 824-825, 72 L. Ed 2d 572, 102 S. Ct. 2157 (1982).** This above binding precedent point up another serious flaw in the Petitioner's reasoning that neither Respondents' privacy interest nor poss--essory interest has been invaded by Officer Fifer's stop, search and seizure of the contraband found in Respondents Simpsons' vehicle, **Id., 437 U.S. 385, AT 393, 57 L. Ed. 2d 290, 98 S. Ct. 2408,** and the Ninth Circuit's " coconspir--ator exception " extended the respondents Simpsons and Xavier V. Padilla is contrary to Fourth Amendment priniples established by this Court, **citing Alderman -V- United States, 394 U.S. 165, 174 (1969); Standefer -V- United States, 447 U.S. 10, 23-24 (1980); AND Brown -V- United States, 411 U.S. 223, 230 & n.4 (1973).**

In addition to erroneously overlooking the important difference between privacy interest and possessory interest, as developed in earlier precedents of this Court, **Maryland -V- Macon, 472 U.S. 463, 469, 86 L.Ed 2d 370, 105 S. Ct. 2778 (1985); United States -V- Jacobsen, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 104 S. Ct. 1622 (1984),** Petitioner categorically failed to make a rat-

-ional analysis of either implicated interest, particularly " a legitimate expect-
-ation of privacy interest "--- versus --- " the things to be seized reasonable possessory interest " [that] very well may have been derived solely from re-
-spondents' alleged joint participation and joint venture relationship in the transportation of the cocaine drugs, and when viewed in this legal context, re-
-spondents' personal Fourth Amendment Rights in terms of both privacy and poss-
-essory interest (s) are sufficiently implicated in the place searched and the property seized over which [the] Respondents exercised joint control and super-
-visory responsibility on the day of the stop and seizure to qualify and with-
-stand intense scrutiny under the Ninth Circuit's " joint venture " theory of standing.

Moreover, Respondent wholly disagrees with Petitioner's argument and con-
-flicting disagreement on one hand that even if respondents had a possessory in-
-terest in the coccine, the brief investigatory stop (without mentioning the full-blown warrantless search conducted thereof) of Arciniega did not interfere with interest in any meaningful way; and on the other hand, Pet. Brief at 12, n. 5, we agree, of course, that if respondents had a legitimate expectation of pri-
-vacy in the trunk of the Cadillac, they would not lose their ability to challen-
-ge the search of the trunk merely because it contained 560 pounds of cocaine. Their possessory interest in the cocaine, however, did not give them a privacy interest in the place where it was located, citing **United States -V- Salvucci, 448 U.S. 83, 93 (1980); Rawlings -V- Kentucky, 448 U.S. 98, 104-106 (1980).** These arguments are wholly contradictory and grossly misstate the law and the re-
-cord evidence in this case. Pet.'s Brief at 12 & n.5; **See also, United States-
-V- Salvucci, 448 U.S. 83, AT 91-92; Rakas -V- Illinois, 439 U.S. 128, AT 139-
-140.**

Contrary to the Petitioner's misguided contentions above, which once again

failed to make an rational analysis of the substantial body of relevant underly-
-ing controlling case laws governing " standing ", in **Rakas -V- Illinois,** this Court explicitly rejected pre-Rakas concepts of " vicarious " standing to assert one's Fourth Amendment Right. **Id., at 133-138, 99 S. Ct., at 425-428.** Reiterat-
-ing that Fourth Amendment Rights are personal rights, the Court stated that"[a] person who is aggrieved by an illegal search and seizure only through the intro-
-duction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment Rights infringed. " **Id., at 134, 99 S. Ct., at 425.**

In the case now before the bar, the record evidence developed below and cor-
-rectly ruled on by each of the lower courts, clearly shows that Respondents Simpson properly asserted a subjective expectation of privacy as well as a valid possessory interest in their automoblie and its contents that must be considered not only reasonable but also objectively reasonable as a matter of law. **See Smith -V- Maryland, supra, 442 U.S.,at 740, 99 S. Ct., at 2580; Katz -V- United States, 389 U.S. 347, 361, 88 S. Ct. 507, at 516 (1967);** and as such, has dem-
-onstrated a legitimate expectation of privacy as well as ownership interest in the contraband seized from the trunk of their vehicle to establish unquestionable Fourth Amendment standing under the " coconspirator exception " for purposes of Fourth Amendment inquiry into the lawless stop and search in question, and whet-
-her society is prepare to acknowledge that the warrantless search of respondents' car violated the Fourth Amendment. **Katz, supra, 389 U.S., 361, 88 S. Ct., at 516; Salvucci, supra, 448 U.S., at 90-91 & n.5, 100 S. Ct., at 2552 & n.5; Rakas, supra, 439 U.S., at 136, 99 S. Ct., at 426; Elkins -V-United States, 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S. Ct. 1437 (1960).**

Taken together*, the foregoing legal precedents mandates that Petitioner's question presented for review as well as its supporting argument be found in full context wholly meritless under the prevelant Fourth Amendment calculus on stand--ing to challenge the herein lawless and unconstitutional intrusion on the const--itutionally protected privacy interest of the Respondents Simpson. Moreover, considering all the circumstances in light of the standard set forth in **Elkins**, it is clearly unreasonable and inconsistent with Fourth Amendment Jurisprudence for the Petitioner to yet be prusuing prosecution of this matter, after receiv--ing adverse decision, and becoming facts, showing that the evidence discovered was obtained by state officers during a lawless and unreasonable search and seiz--ure that was found to have violated Respondents' immunity from unreasonable searches and seizures under the Fourth Amendment as a result of Respondent's timely objection asserted in the courts below. **Id**.

Further, the **Elkins** court left no room for doubt that the herein petition for writ of certiorari should and must be denied, as a matter of constitutional law and as defined by **Gambino -V- United States, 275 U.S. 310, 72 L.Ed. 293, 48 S. Ct. 137, 52 ALR 1381.**

In **Gambino**, the Court found that state officers, as herein, had seized liq--uor from the defendants' automobile after an unlawful search in which no federal officers had participated. The liquor was admitted in evidence against the defen--dants in their subsequent federal trial for violation of the National Prohibit--ion Act. This Court reversed the judgment of conviction, holding that the ill-

*** Contrary to the record evidence developed at the suppression hearing, Pet--ition's Brief at 13, n.6, erroneously states that Donald Simpson held title to the vehicle, and Maria Sylvia Simpson claimed ownership interest based on her co--mmunity property rights, citing Resp. C.A. Br. 9. Petitioner obviously is play--ing a long shot gamble this court or its staff will not carefully and throughly examine and read the pertinent records. Respondent Simpson respectfully hopes and trusts that Court do no less in the interest of justice.**

--egally seized evidence should have been excluded. Pointing out that there was " no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the [state] troopers believed that they had, " the Court found that " [t]he wrongful arrest, search and seizure were made solely on behalf of the United States. " **Id. 275 U.S., at 314, 316; Elkins, supra, 364 U.S., at 211-212.**

Finally, the respondents Donald Lake Simpson and Maria Sylvia Simpson also ask this Honorable Court to dismiss the Government's request for writ of certio--rari with prejudice for the following reasons: (i) this Honorable Court lacks jurisdiction as did the Ninth Circuit Court of Appeals to rule upon the merits of a case of a District Court where the trial is in progress. The District Court's pre-trial suppression of evidence order is but part of the trial process and is not a dismissal of the indictment. **See, Abney-V- United States, 431 U.S. 651, 52 L. Ed.2d at 658, 97 S. Ct. 2034 [7,8]; (ii) since appeals of right** have been authorized by congress in criminal cases, as in civil cases, there has been a firm congressional policy against interlocutory or " piecemeal " appeals and courts have consistently given effect to that policy. Finalty of judgment has been required as a predicate for federal appellate jurisdiction. **DiBella -V- United States, 369 US 121 (1962).**

The effect of the statute is to disallow appeal from any decision which is tentative, incomplete or informal. Appeal gives the upper courts a power of re--view, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. Nor does the statute per--mit appeals, such as the Government's petition, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the trial proceed--ing that effectively may be reviewed and corrected if and when final judgment

results. But this order of the District Court that Petitioner is appealing did not make any step toward final disposition of the merits in this case and will not be merged in final judgment as conferred by the statute, and thus, at this time, Petitioner should be denied any review until the whole case is adjudicated on the trial level.

As this Court is well aware, **DiBella, supra, at 124, Congress requires that review of nisi prius proceedings await their termination by final judgment.** Accord, Cobbledick -V- United States, 309 US 323, 324-326, 84 L. Ed. 783, 60 S. Ct. 540 (1940); DiBella, supra, at 126. Clearly, the order Petitioner appeals from fails to reach the crieria of falling within the so called " collateral order " exception to the final-judgment rule first announced in Cohen -V- Beneficial In--dustrial loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S.Ct. 1221 (1949), and therefore is not a final decision within the meaning or purpose of 28 U.S.C., § 1291 [28 USCS § 1291]; Cohen, Supra, at 546, 93 L.Ed. 1528, 69 S. Ct. 1221.

Moreover, Respondents recognize and concedes the validity of 18 U.S.C., § 3731 shall be liberally construed to effectuate its purpose of the United States timely appealing the District Court suppression of evidence order, nonetheless, maintains and argues that taking all the foregoing factors into full account, the true issues remains wholly unaltered by Petitioner's primary argument, that is, (i) the record evidence show the Government did not have [a] reasonable suspicion that the respondents were in engaged in any criminal activity at the time the Government stopped, seized and searched Arciniega and Respondents' veh--icle; and (ii) that Respondents' legitimate ownership of vehicle and member--ship in a joint venture to transport drugs gave respondents as co-conspirators a legitimate expectation of privacy entitling them with standing to challenge the investigatory stop of one of the members of the conspiracy, and the subsequent search of the respondents' vehicle he was driving; and (iii) the District

Court's findings and ultimate order were basically error free and Petitioner failed on each judicial level below to show that they were in fact clearly err--oneous as a matter of law; and thus, these consistent failures should suffice to end [the] Court's herein inquiry for all practical purpose, and the lower courts' order should be affirmed as to Respondents herein.

In conclusion, Petitioner's continuing repeated attacks made on the lower federal courts' proper enforcement of their flagrant violations of the Fourth Amendment must be rejected. The Fourth Amendment judisprudence announced by the decisions of the Ninth Circuit Court of Appeals are designed in specific purpose and intent to protect the good guy as well as the bad to be left alone in our homes, our cars, and wherever we may go. If the government is not deterred from illegal intrusions of privacy by excluding whatever evidence is seized, the Four--th Amendment will have hardly no meaning or force. Surely an appreciation for the history and purpose of our basic Fourth Amendment freedoms will never allow emotional fear to justify an enviroment where is no check on the abuse of the governments police power. The exclusionary rule serves one purpose --- deterren--ce, United States -V- Janis, 428, U.S. 433, 446,96 S.Ct. 3021, 3028, 49 L.Ed. 2d 1046 (1976); Mapp -V- Ohio, 367 U.S. 643, 656, 81 S. Ct. 1684, 1692, 6L.Ed 2d 1081 (1961), to repeated police misconduct alleged herein.

Justice Clark wrote for the Court in **Mapp** that the exclusionary rule was both " logically and constitutionally necessary. " He observed the doctrine was " an essential part of the right to privacy " and was " an essential ingredient of the right " to be free from unreasonable searches and seizures. **Id.** He then concluded, " to hold otherwise is to grant the right but in reality to withhold its privilege. " **Id. 367 U.S. 643, at 656, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081 (1961).** Petitioner attempts to proceed in reckless disregard of these legal pr--inciples. Nonetheless, it is the law, Petitioner's herein expressed disagreement

is immaterial and clearly beside the point, and this Court is obliged to re--quire Government compliance.* **United States** -V- **Chadwick**, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977).

The record evidence leave no room for doubt that herein respondents had a reasonable legitimate expectation of privacy as well as a possessory interest in the things seized and the place searched, and therefore had a legitimate standing to question and attack an illegal and unreasonable stop and search that undisputedly contravened the Fourth Amendment. **United States** -V- **Jeffers**, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); **Jones** -V- **United States**, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960); **Rakas** -V- **Illinois**, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978); **United States** -V- **Salvucci**, 488 U.S. 83, 92, 100 S.Ct. 2547, 2553, 65 L.Ed. 2d 619, 628 (1980); **Rawlings** -V- **Kentucky**, 448 U.S 98, 100 S.Ct. 2556, 65, L.Ed. 2d 633 (1980); **United States** -V- **Quinn**, 751 F. 2d 980, (CA 9 1984), **Cert. Granted**, 474 U.S. 900 (1985), Cert. Dismissed, 475 U.S. 791 (1986). The Petitioner's legal position also wholly failed to pay due regard to this Court's repeated Fourth Amendment jurisprudence that the ins--tant type warrantless search and seizure involved in this case are per se pres--umptively unreasonable and such presumption must be jealoursly maintained in a constitutional framework. **See**, **e.g.**, **Payton** -V- **New York**, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980); **Coolidge** -V- **New Hampshire**, 403 U.S. 443, 445, 474-475, 91 S.Ct. 2022, 2032, 2042, 29 L.Ed. 2d 564 (1971) (footnotes omitted) (emphasis added). This instant case therefore merits similar treatment.

In sum, the decisions of the District Court and the Court of Appeals flatly rejected petitioner's Fourth Amendment challenge asserted to the issue of " coconspirator standing exception " and consistent with the Court's govern--ing Fourth Amendment jurisprudence and analysis employed when it has consider--ed prior similar challenges, the petitioner's latest challenge should be re--jected as well, in the light of **United States** -V- **Quinn**, **supra**; and **United States** -V- **Chadwick**, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977).

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* In **Chadwick**, this Court held invalid a warrantless search of a locked footlocker lawfully seized as incident to defendant's arrest but which was not immediately associated with him. A fortiori as in **Chadwick**, equal administration of law compels that results herein.

CONCLUSION

Wherefore, based upon the above record evidence and authorities, The Petit--ion for writ of certiorari should be denied accordingly.

Respectfully submitted and dated this the Twenty first day of September 1992.

Respectfully Submitted
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the fore--going opposition to petitioner's petition for writ of certiorari has been mailed, first class, postage pre-paid, to the following named parties:

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Dated this the 21st day of September 1992.

Respectfully Submitted
(S) Donald Lake Simpson
Donald Lake Simpson, Respondent-Pro Se

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER	)	
	)	
V	)	NO. 92-207
	)	
XAVIER V. PADILLA, ET AL.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **REPLY BRIEF FOR THE UNITED STATES** by mail on October 26, 1992.

SEE ATTACHED SERVICE LIST

Kenneth W. Starr/cs
KENNETH W. STARR
Solicitor General

October 26, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, PETITION	)	
	)	
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XAVIER V. PADILLA, ET AL.	)	
	)	

AMENDED - CERTIFICATE OF SERVICE

Walter B. Nash III, a member of the United States Supreme Court Bar, and counsel of record for the Respondents, having filed a brief in opposition of the Petition for Writ of Certiorari filed by the United States of America in the case of United States of America v. Xavier V. Padilla, case number 92-207, hereby avows that three copies of the brief was served upon the following counsel for Petitioner by first class mail on October 16th, 1992.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITION	)	
	)	
V.	)	NO: 92-207
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XAVIER V. PADILLA, ET AL.	)	
	)	

CERTIFICATE OF SERVICE

Walter B. Nash III, a member of the United States Supreme Court Bar, and counsel of record for the Respondents, having filed a brief in opposition of the Petition for Writ of Certiorari filed by the United States of America in the case of United States of America v. Xavier V. Padilla, case number 92-207, hereby avows that three copies of the brief was served upon the following counsel for Petitioner by first class mail on October 2, 1992.

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No. 92-207

In The
Supreme Court of the United States
October Term, 1992

United States of America,

Petitioner,

v.

Xavier V. Padilla, et al.,

Respondents,

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

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No. 92-207

In The
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QUESTION PRESENTED

1. Whether the Ninth Circuit Court of Appeals properly follows the mandates of this Court in determining whether an individual possesses a reasonable expectation of privacy under the Fourth Amendment.

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RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

Respondents respectfully pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed April 1, 1992 be denied.

STATEMENT OF THE CASE

I. BACKGROUND

The six Respondents - Maria Sylvia Simpson, Donald Lake Simpson, Xavier V. Padilla, Maria Jesus Padilla, Jorge Padilla, and Warren Strubbe - were charged in a single indictment alleging that they conspired to possess cocaine with the intent to distribute (21 U.S.C. §846) and that they actually committed that offense. (21 U.S.C. §841(a)(1)). These charges emanated from the seizure of cocaine from the trunk of a car owned by Donald and Maria Simpson (husband and wife). At the time of the seizure, the Simpson's car was being driven by coconspirator Luis Arciniega.

The District Court held that the seizure and search of the Simpsons' car violated the Fourth Amendment. The court suppressed the evidence as to all six

Respondents. The government appealed.

On appeal, the government conceded that the challenged seizure and search violated the Fourth Amendment, but argued that none of the Respondents had a legitimate expectation of privacy and therefore had no ability to challenge the illegal seizure and search. *United States v. Padilla*, 960 F.2d 854, 858 (9th Cir. 1992). The Ninth Circuit Court of Appeals affirmed the suppression order as to Respondents Maria Simpson, Donald Simpson and Xavier Padilla. Because the record was insufficient to make a determination of whether Maria Jesus Padilla and Jorge Padilla had a legitimate expectation of privacy in the car, the court remanded the case to the district court for further evidentiary hearings on that issue. The court of appeals held that Warren Strubbe lacked

any reasonable expectation of privacy in the car. The court therefore reversed the suppression order as to Strubbe. *Id.* at 863-864.

II. FACTUAL STATEMENT

Virtually all of the evidence against Respondents was obtained as the result of the seizure and search of an automobile owned by Maria Simpson and Donald Simpson, but driven by coconspirator Luis Arciniega. *Id.* at 862. The illegal seizure occurred on September 26, 1989, on Interstate Highway 10 between Tucson and Phoenix, Arizona. A state highway patrol officer stopped the Simpsons' automobile despite the fact that the driver committed no traffic violation. *Id.* at 856. A subsequent search of the trunk revealed packages labeled "pollo", the Spanish word for "chicken". The packages were opened,

revealing cocaine. 5/8/90 Tr. 120; 5/15/90 Tr. 95-96, 103-104.

The government conceded in the Ninth Circuit, and concedes here, that the stop of the Simpsons' car violated the Fourth Amendment. The unrefuted evidence presented in the district court, consisting of documents and avowals from defense counsel, established that the Simpsons and Xavier Padilla were engaged in a sophisticated and coordinated venture to transport the contraband from Mexico, through the State of Arizona and into the State of California.[1] 960 F.2d at 860. The undisputed evidence provides

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[1]Maria Jesus Padilla and Jorge Padilla were also involved in this effort, although - as the Ninth Circuit found - the record is insufficient to allow a determination of their role. Warren Strubbe was initially involved in the venture, but his role ended prior to the challenged seizure. 960 F.2d at 861-862.

a complete, chronological illustration of the facts which demonstrate that the Simpsons and Xavier Padilla possessed a legitimate expectation of privacy under the pertinent decisions of this Court.

A. Maria Simpson

Maria Simpson and her husband, Respondent Donald Simpson, co-owned the automobile that was illegally stopped by an Arizona highway patrolman on the afternoon of September 26, 1989. The cocaine that was seized from the trunk of that vehicle had - for purposes of this case - originally came from Mexico and was being transported at the request of its owner. Mrs. Simpson met with the owner in Mexico shortly before the load of cocaine in question was transported into the United States. In that meeting, Mrs. Simpson complained that she had not been paid for the previous three loads of

cocaine that she had driven into the United States. The owner promised to pay her after the next load was transported. Mrs. Simpson accepted this proposal. *Id.* at 860 n.4.

The contraband at issue was put in the Simpson's car in Mexico on the same day that it was seized. After Ms. Simpson drove it into the United States, she turned her car over to Luis Arciniega, but remained involved in a continuous chain of activity with the vehicle. The car was to be returned to the Simpsons after the delivery was completed. Mrs. Simpson and her husband were then to be paid for their role in the smuggling/transportation venture. *Id.* at 860; 5/30/90 Tr. 73-77, 111-118.

B. Donald Simpson

Donald Simpson was the co-owner of the automobile in question. Immediately

after the illegal traffic stop, but prior to the search of the trunk, the driver, Arciniega, showed the highway patrol officer the insurance certificate which named Mr. Simpson as the owner of the car. 960 F.2d at 856; 5/8/90 Tr. 169-171. Like his wife, Mr. Simpson was to receive payment after the load of cocaine at issue was delivered. The car was also to be returned to him.

In addition, Mr. Simpson was a United States Customs agent and was therefore able to protect the privacy of the contraband in the trunk of his car when it crossed into this country. Telephone records also revealed that Mr. Simpson coordinated and supervised efforts to maintain secrecy as to the illegal cargo. 960 F.2d at 860.

C. Xavier Padilla

Xavier Padilla met with the owner of

the contraband to plan and control its transportation from Mexico through Arizona to its destination in California. Mr. Padilla was ultimately responsible for the load, including on the very day of the stop. Although a resident of Douglas, Arizona, the border town where the car crossed into the United States, Mr. Padilla traveled "virtually along with" the car once it entered this country, and gave directions as to its travel. 960 F.2d at 860; 5/8/90 Tr. 71; 5/30/90 Tr. 69-73, 106-111.

After the Simpson vehicle was illegally stopped and searched by police officers, Arciniega agreed to make a "controlled delivery" of the car in Tempe, Arizona, a suburb of Phoenix. Upon arriving in Tempe, Arciniega placed telephone calls to the Tempe residence of Xavier Padilla's sister. Arciniega spoke

to Mr. Padilla, who was to be called if there were any questions or problems concerning the load. Mr. Padilla sent his wife and brother (Respondents Maria Jesus Padilla and Jorge Padilla) to pick up the Simpsons' car and the contraband. Maria Jesus Padilla and Jorge Padilla arrived in a car that had been rented by Xavier Padilla; he was found at his sister's home a short distance away. 960 F.2d at 856-857.

REASONS FOR DENIAL OF THE PETITION

I. INTRODUCTION

Petitioner alleges that the Ninth Circuit Court of Appeals has turned its back to the rulings of this Court concerning the right to object to searches and seizures under the Fourth Amendment in conspiracy cases. Contrary to Petitioner's allegations, the judges

of the Ninth Circuit have not "sought to evade"[2] the dictates of this Court's opinions, nor have the judges issued rulings which "conflict with the law of every other circuit . . ."[3]

Petitioner's argument is based on a fundamental misinterpretation of Ninth Circuit decisions. The Ninth Circuit has not - as Petitioner claims - granted individual defendants the right to object to searches and seizures based upon their supervision or control of a conspiracy; the Ninth Circuit has granted individuals the right to object based upon their right of supervision or control over property that may arise from a conspiracy. To permit Fourth Amendment challenges simply based upon a person's

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[2]Petition for Writ of Certiorari, at 9.

[3]*Id.* at 14.

role in a conspiracy would, as the court of appeals recognized in the case at bar, be "in clear contravention of holdings of the Supreme Court and this circuit." [Insert citation] The Ninth Circuit has recognized that each case must be decided based on the pertinent evidence as to each individual defendant[4], not by their "role" in a conspiracy. The court has further recognized that an express or implied agreement with others may grant or protect an individual's right of privacy in a particular place or property.[5]

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[4]Petitioner's claim, at 10, that the Ninth Circuit has "manufactured a complex, fact-intensive theory" is groundless. Rights of privacy always have been - and by their very nature must be - decided based on the facts of each case.

[5]Such as when a person entrusts another to deliver a package (*United States v. Jacobsen*, 466 U.S. 109, 114 (1984)), is an overnight guest in

This right of privacy may exist or endure even when the individual is not present[6] or is not able to exclude others. To determine whether a legitimate expectation of privacy exists, courts must look to precautions taken to maintain privacy. *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980).[7]

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another's home (*Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990)) or shares a work place. *Mancusi v. DeForte*, 392 U.S. 364, 368-369 (1968).

[6]*United States v. Jacobsen*, 466 U.S. at 114; *United States v. Alderman*, 394 U.S. 165, 176 (1969). Under some circumstances, an individual may be present at the location searched, but still lack a legitimate expectation of privacy. *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980); *Rakas v. Illinois*, 439 U.S. 128, 148 (1978).

[7]Petitioner's claim, at 9, that the Ninth Circuit's finding that Xavier Padilla had a right to object to the seizure in this case violated the dictates of *Rawlings v. Kentucky* is baseless. *Rawlings* involved a gratuitous bailment which arose when the defendant dumped his drugs into an acquaintance's purse as the police arrived. 448 U.S. at

As the following analysis demonstrates, the Ninth Circuit's decisions stand for propositions which flow directly from this Court's rulings. The Ninth Circuit's decisions are also consistent with decisions of the other eleven circuits. There is no reason to grant certiorari; this Court's precedents governing the right to object to governmental searches and seizures are clear and have been properly followed.

II. NINTH CIRCUIT DECISIONS ARE CONSISTENT WITH THE RULINGS OF THIS COURT AND THE OTHER COURTS OF APPEALS

A. THE NINTH CIRCUIT HAS REFUSED TO FIND A LEGITIMATE EXPECTATION OF PRIVACY FOR PARTIES WHO WERE MERELY COCONSPIRATORS OR "JOINT

101-102. In the present case, Xavier Padilla took careful measures to ensure that no intrusion would be made into the locked trunk of the car, including planning the car's travel and virtually traveling along with the car on its route.

VENTURERS"[8]

Petitioner alleges that the judges of the Ninth Circuit have conspired to disregard the Fourth Amendment decisions issued by this Court. This allegation is groundless, as the court of appeals demonstrated in this very case. The Ninth Circuit did not find that three of the coconspirator/joint venturers had a legitimate expectation of privacy; if there were indeed such a blanket rule, all Respondents would have the right to object. 960 F.2d at 863-864.

The court of appeals has never held that a defendant's status as a coconspirator, in itself, supports the

[8]Contrary to Petitioner's assertions, the term "joint venturer" is not a term descriptive of the court of appeals' refusal to follow this Court's decisions, but is simply a term of convenience that the Ninth Circuit has used to depict persons working together toward the commission of a crime.

right to challenge unlawful searches or seizures. *See, United States v. Taketa*, 923 F.2d 665, 672 (9th Cir. 1991); *United States v. Culbert*, 595 F.2d 481, 482 (9th Cir. 1979); *United States v. Mulligan*, 448 F.2d 732 (9th Cir. 1973); *United States v. Haili*, 443 F.2d 1295 (9th Cir. 1971). The Ninth Circuit has ruled, where appropriate, that even a defendant who is present during the search of a confederate may lack the right to contest the admissibility of evidence seized. *United States v. Grandstaff*, 813 F.2d 1353, 1357 (9th Cir. 1987); *United States v. Kovac*, 795 F.2d 1509, 1511 (9th Cir. 1986); *United States v. Medina-Verdugo*, 637 F.2d 649, 651 (9th Cir. 1980)(Kennedy, J.); *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980). The court has reached this conclusion even in cases in which the

defendants have been charged with the possession of the contraband seized from their confederates. *United States v. Aikins*, 946 F.2d 608, 613 (9th Cir. 1990); *United States v. Lockett*, 919 F.2d 585, 588 (9th Cir. 1990); *United States v. Kuespert*, 773 F.2d 1066, 1068 (9th Cir. 1985); *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984).

The court of appeals has consistently followed this Court's mandates regarding expectations of privacy for purposes of the Fourth Amendment. For example, in *United States v. Taketa*, 923 F.2d at 668-669, 672, the court held that Taketa had no legitimate expectation of privacy in his codefendant's office despite the fact that Taketa had an office in the same suite and had free access to the codefendant's office where the crime was

committed. In reaching this conclusion, the court stated:

> To hold that these conspirators all have a legitimate interest in privacy in [codefendant] O'Brien's office would establish the Ninth Circuit's "coconspirator exception" as a true coconspirator exception of general applicability to any person accused of criminal conspiracy. Such a blanket exception to *Rakas* [*v. Illinois*, 429 U.S. 128 (1978),] would contravene holdings of the Supreme Court and this Circuit.

Id. at 672.[9]

B. THE NINTH CIRCUIT DECISIONS CITED BY PETITIONER WERE PROPERLY DECIDED AND DO NOT CALL FOR REVIEW BY THIS COURT

When the Ninth Circuit has addressed questions concerning expectations of privacy in conspiracy or "joint venture"

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[9]Petitioner's intimation, at pages 8 and 10 of the petition, that *Taketa* recognized the existence of a "coconspirator exception" to this Court's Fourth Amendment rulings is therefore misleading.

cases, it has separately analyzed the evidence relating to each party to determine whether that individual's Fourth Amendment interests were affected. The cases relied on by Petitioner, at 8, do not support its position.

1. In *United States v. (George) Johns*, 851 F.2d 1131, 1136 (9th Cir. 1988), the court held that the defendant had the right to object to the search of a rental storage unit which was in the codefendant's name. The court properly reached this conclusion because the defendant established that he paid part of the rental fee and co-owned the property inside the unit.

2. In *United States v. Broadhurst*, 805 F.2d 849, 850 (9th Cir. 1986), the court analyzed the individual privacy interests of six defendants in a remote residence which housed a marijuana

growing business. Each defendant was found to have standing because he or she lived on the premises, worked on the premises or owned the premises. *Id.* at 851-852. This decision conforms to the well established proposition that owners and employees may possess a legitimate expectation of privacy in their work place. *See, e.g., Mancusi v. DeForte*, 392 U.S. 364, 368-369 (1968). The fact that the search revealed that the business was illicit cannot, of course, defeat the owners' and employees' right to object to the search. *See* Petition for Writ of Certiorari at 12 n. 5.

3. *United States v. Quinn*, 751 F.2d 980, 981 (9th Cir. 1984), *cert. granted*, 474 U.S. 900 (1985), *cert. denied*, 475 U.S. 791 (1986), raised the question of the right to object to the search of a boat. The Ninth Circuit held

that, although Quinn was not on the boat at the time of the search, he had a legitimate expectation of privacy because he owned the boat and the contraband on it, the search occurred immediately after he left the boat, and he took extensive precautions to protect his privacy interests in the boat.

4. In *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984), the defendant was found to have a reasonable expectation of privacy in the house where an illicit drug laboratory was found. Although Pollock did not own or live on the property, he moved the laboratory into the house with the owner's permission, took steps to maintain privacy, worked in the laboratory, and was present when the search occurred. *Id.* at 1465.

5. In *United States v. (Lyle) Johns*, 707 F.2d 1093 (9th Cir. 1983), *reversed on other grounds*, 469 U.S. 478 (1985), two pilot/defendants turned packages containing marijuana over to their coconspirator/employees for delivery. The pilot/defendants presented evidence that the marijuana belonged to them and that the coconspirator/employees would not be paid until the packages were delivered. The court concluded that the pilot/defendants had the right to object to the search of the packages due to their retained interest in them.[10] *Id.* at 1099-1100. This case comports with

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[10]The Ninth Circuit has held that conspirators retain no legitimate expectation of privacy when they demonstrate no continuing interest after turning contraband over to another. *United States v. Mendia*, 731 F.2d at 1414; *United States v. Culbert*, 595 F.2d at 482; *United States v. Turner*, 528 F.2d 143, 164 (9th Cir.), *cert. denied*, 423 U.S. 996 (1975); *United States v. Toliver*, 433 F.2d 867, 869 (9th Cir. 1970).

the settled principle that the owner of a package maintains a legitimate expectation of privacy in a package in transit. *United States v. Jacobsen*, 466 U.S. at 114.

6. Finally, in *United States v. Perez*, 689 F.2d 1336 (9th Cir. 1982), the defendants hired a driver and truck to transport their contraband, took steps to ensure the privacy of the contraband, and traveled with the truck. Under these circumstances, the court of appeals held that the defendants possessed a legitimate expectation of privacy in the contraband hidden in the truck.

Petitioner cannot direct this Court to any case - for none exist - in which the Ninth Circuit has found a party's status as a coconspirator to support a legitimate expectation of privacy in a place searched or an item seized. The

Ninth Circuit has found expectations of privacy in a joint venturer only when that individual presented evidence demonstrating control over the place searched or the property seized.[11]

C. THE OTHER CIRCUITS HAVE DECIDED "JOINT VENTURE" CASES CONSISTENTLY WITH THE OPINIONS OF THE NINTH CIRCUIT

The courts of appeals of the other eleven circuits have been called upon to decide cases which raise expectation of privacy issues for coconspirators or for

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[11]Petitioner also complains, at 11 n.3, that the Ninth Circuit's decisions serve to free minor defendants while permitting the worst offenders to go free. This is simply untrue. The court of appeals has consistently focused on the issue of privacy interests; in some cases this may be a mere courier, while in others it will be a kingpin. In any case, the Fourth Amendment is designed to protect the members of a free society from arbitrary intrusions by government, not to determine the appropriate punishment of various players in a criminal conspiracy.

persons who rely on others to protect their belongings. In those cases, the courts have reached conclusions that are consistent with the decisions of the Ninth Circuit.

1. In *United States v. Kye Soo Lee*, 898 F.2d 1034, 1035 (5th Cir. 1990), two defendants were stopped while driving a rental truck in Louisiana. The defendant who actually rented the truck was in New York at the time. The court held that all three defendants demonstrated a legitimate expectation of privacy in the truck and its contents. *Id.* at 1038.

a. The defendants in the truck denied renting the truck, owning the contents, or being able to unlock the

cargo area of the truck.[12] The court held that the defendants could object under the Fourth Amendment because the renter of the truck and owner of the cargo entrusted them with the property.

b. The defendant who was thousands of miles away at the time of the stop and search had the right to object because he rented the truck, owned the contents, and locked the cargo area, giving keys only to the other defendants.

2. In *United States v. Most*, 876 F.2d 191, 192 (D.C. Cir. 1989), the defendant left a plastic bag with a store clerk, with the understanding that he would return for it later. The court held that he retained a legitimate

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[12]Shortly after the stop, however, the investigating officer found that these defendants did have a key that would open the lock on the cargo area. *Id.* at 1036.

expectation of privacy in the bag. *Id.* at 198.

3. In *United States v. Dotson*, 817 F.2d 1127, 1134 (5th Cir. 1987), the defendant challenged the search of his car which he had loaned to a codefendant. The court found that the defendant had not forfeited his expectation of privacy in the car[13] because the loan was for a limited period of time. *Id.* at 1135.

4. In *United States v. Freire*, 710 F.2d 1515, 1519 (11th Cir. 1983), the defendant successfully argued that he held a legitimate expectation of privacy in a briefcase despite the fact that he turned it over to a codefendant eight hours before the challenged search.

5. In *United States v. Allison*,

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[13]The court reached this conclusion despite the fact that the title to the car was not in the defendant's name.

619 F.2d 1254, 1256 (8th Cir. 1980), the defendants were labor union officials who were under investigation for embezzling union funds. Defendants Allison and Greer, both of whom worked at the union office, successfully argued that they had a reasonable expectation of privacy in records that were kept in a union storeroom. *Id.* at 1260.

6. In *United States v. Lonabaugh*, 494 F.2d 1257, 1259 (5th Cir. 1973), acting on an informant's tip, police officers watched the defendant and a companion enter an airport with two suitcases. The defendant purchased an airline ticket and checked the luggage. He gave the ticket and claim checks to his companion. When confronted by authorities, the defendant admitted that the luggage belonged to him. Despite the fact that the defendant gave up custody

and control, the court held that he maintained a legitimate expectation of privacy in the luggage. *Id.* at 1262.

7. In *United States v. Eldridge*, 302 F.2d 463, 464 (4th Cir. 1962), the court held that the defendant did not give up his right to object to a search of his car trunk despite the fact that he had loaned the car - and the trunk key - to a friend who had the car at the time of the search.

Under any name, and in any circuit, individuals can establish a reasonable expectation of privacy, not only as a result of their personal efforts, but also by enlisting the assistance of others.

D. THE CASES CITED BY PETITIONER FROM OTHER CIRCUITS WOULD HAVE BEEN DECIDED NO DIFFERENTLY BY THE NINTH CIRCUIT

Petitioner has obviously conducted

extensive research in an effort to locate federal decisions that will convince this Court that those decisions would have been decided differently under the Ninth Circuit's supposed "joint venture" rule. While some inconsistencies are to be expected in the application of any fact-based doctrine, Petitioner's effort fails as to each case. None of the cases cited in the petition, at 14-16, involved facts such as those presented here. None of those cases involved defendants who owned the place searched, had a proprietary interest in the property seized, or engaged in continuous efforts to protect the property from intrusions by government officials.

1. In *United States v. Kiser*, 948 F.2d 418 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1666 (1992), the defendant sought to challenge the search of an

employee's car. The employee was transporting the defendant's cocaine in Florida while the defendant was in Iowa. *Id.* at 421, 423. There is no indication in the opinion that the defendant gave his courier any directions regarding travel, maintained contact with him, or even knew his location. The court correctly concluded that the defendant had no legitimate expectation of privacy in the employee's car. *Id.* at 424.

The *Kiser* opinion does contain excessively broad language indicating that an employer cannot assert a Fourth Amendment privacy right through an employee's acts. *Id.* This cannot be true. Certainly, an attorney's absence does not defeat a legitimate expectation of privacy in his or her office when the office is occupied by a secretary or paralegal. *Kiser* also stated, in dicta,

that it would not follow the Ninth Circuit's "joint venture/co-conspirator exception to the standing rules announced by the Supreme Court." *Id.* As is demonstrated in section II(B), above, the Ninth Circuit has followed the dictates of this Court in applying the Fourth Amendment to the cases before it.

2. In *United States v. Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985), the court held that defendants who were not present at the time that trucks containing contraband were searched could not assert a sufficient privacy interest solely by claiming that they would profit from the sale of the marijuana. The Ninth Circuit has never held that a future financial interest from contraband, without some control over the property, can provide an expectation of

privacy under the fourth amendment.

3. The Eleventh Circuit, in *United States v. Brown*, 743 F.2d 1505, 1507-1508 (11th Cir. 1984), held that a defendant could not possess a legitimate privacy interest in contraband strapped to his codefendant's body. In reaching this conclusion, however, the court specifically pointed out, "Unlike a house, a hotel room, an automobile or a briefcase, one cannot acquire a right to exclude others from access to a third person." *Id.* at 1507. The court clearly limited its holding to the facts before it and did not discuss any expectation of privacy that might be created through an agreement with a third party in other circumstances.[14]

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[14]Petitioner's statement, at 15, that the eleventh circuit "refused to recognize 'joint venture standing'" in *Brown* is therefore, at best, a gross

4. In *United States v. Soule*, 908 F.2d 1032, 1036 (1st Cir. 1990), the court simply and properly held that a defendant had no right to object to a search of a truck when he was not present, had no interest in the truck, and had no interest in the contents.

5. In *United States v. DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981), the defendant, after unsuccessfully arguing that there was insufficient evidence to convict, attempted to object to the admission of contraband seized from a coconspirator's car in the defendant's absence.[15] The opinion reveals no evidence that the defendant was nearby or

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overstatement.

[15]The defendant failed to raise this issue in the trial court; the court of appeals therefore only reviewed the Fourth Amendment claim under the plain error standard. *Id.* at 337.

attempted to exert any control over the contraband. The opinion gives no indication that the defendant claimed an ownership interest in the seized property.

6. The mere fact that the defendants stored stolen property in a particular building - over which they had no control - did not give them the right to object to a search of that building. *United States v. Galante*, 547 F.2d 733, 737 (2d Cir. 1976).

7. In *United States v. Lisk*, 522 F.2d 228, 229 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 423 U.S. 1078 (1976), the defendant asked a friend to keep a bomb for him until he asked for it back. The bomb was placed in the trunk of the friend's car. The defendant had no interest in or control over the friend's car, nor did the defendant make any

effort to protect the car from law enforcement intrusions. The court held that the defendant did have a right to object to the seizure of his property (the bomb), but had no privacy interest in the car. *Id.* at 330.

These cases all stand for the simple proposition that an individual cannot maintain a legitimate privacy interest in property when he or she relinquishes control without taking steps to protect the property from unwanted scrutiny. The Ninth Circuit has never held otherwise.

III. THE COURT OF APPEALS CORRECTLY DECIDED THE CASE AT BAR

Petitioner asserts, at 11, that the Ninth Circuit decided the present case with regard to Maria Simpson, Donald Simpson and Xavier Padilla based upon "their status as principals in the joint venture." Petition for Writ of

Certiorari, at 11. In light of the fact that, as demonstrated above, the court of appeals has never decided this or any other case by focusing only on the defendants' status as joint venturers, Petitioner's argument obviously must fail. Further, in this particular case, the three Respondents at issue had far greater privacy interests than mere coconspirators.

The petition, at 11 n. 4, concedes that the Simpsons owned the car that was stopped. Petitioner also appears to concede, at 12, that the Simpsons and Xavier Padilla held a possessory interest in the contraband found in the trunk of the Simpson's car. Petitioner ignores the fact that both the Simpsons and Xavier Padilla were directly involved in shepherding the car from Mexico to Arizona, and that Xavier Padilla was in

charge of decisions as to who would drive the car, what route it would take, when it would travel, and was to resolve any problems that arose. This is not a case in which contraband was simply passed from one conspirator to another, or sold from one individual to another. This is a case in which, through agreement among the parties, care was taken to protect the cargo as it traveled through Arizona. Certainly, there is a far more substantial basis to find a right of privacy when cargo is so carefully protected as here, than in a case in which an individual sends a package by a messenger service. *Compare United States v. Jacobsen*, 466 U.S. at 114. Unless the Fourth Amendment protects the privacy of businesses operated in a coordinated fashion of this kind, there will be no protection for any commercial shipping -

legitimate or otherwise - from arbitrary governmental intrusion.

IV. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW OF DECISIONS BY THE NINTH CIRCUIT CONCERNING THE RIGHT TO OBJECT UNDER THE FOURTH AMENDMENT

Even should this Court wish to examine the Ninth Circuit's treatment of privacy interests of coconspirators under the Fourth Amendment, this case is an inappropriate one due to its facts. First, Petitioner recognizes, at 16 n. 7, that this Court previously granted certiorari in *United States v. Quinn*, 751 F.2d at 981, but declined to decide the case because the issue was complicated by Quinn's ownership of the boat in question. The same problem exists here due to the Simpsons' ownership of the car.

Secondly, as the Ninth Circuit panel recognized, the record is inadequate to

permit a reasoned decision as to the expectation of privacy held by Respondents Maria Padilla and Jorge Padilla. Respondent Warren Strubbe's claim of a privacy interest was rejected by that panel.

Finally, and most importantly, the Ninth Circuit correctly decided the that Maria Simpson, Donald Simpson and Xavier Padilla had a legitimate expectation of privacy in the Simpson's car and its cargo under settled principles announced by this Court. In addition to their interests in the car and the contraband, these individuals took measures, similar to those undertaken by any businessperson who is shipping valuable property, to protect the property.

CONCLUSION

The decisions of this Court have set

reasonable standards by which the protections of the Fourth Amendment can be enforced. Those standards provide trial court's with sufficient guidance, while remaining sufficiently flexible, to determine whether a defendant holds a legitimate expectation of privacy in a place searched or in property seized. While some disparity will occur under any fact-based system of applying the law, no better alternative exists. Certainly, this Court would never accept a suggestion that no person may claim the protection of the Fourth Amendment by arranging for their privacy with other persons or that no such protection exists unless the property owner is present. Such a ruling would permit unscrupulous law officers to search our cars and ransack our homes and offices whenever we were absent. The parameters of the

Fourth Amendment do not depend upon whether one chooses to go out to dinner or to remain home.

Petitioner asks this Court to grant certiorari based upon the erroneous belief that the judges of the Ninth Circuit Court of Appeals are ignoring clear Fourth Amendment law. No such disobedience from this Court's rulings has occurred. The petition for certiorari must therefore be denied.

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(3)

No. 92-207

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER V. PADILLA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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UNITED STATES OF AMERICA, PETITIONER

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REPLY BRIEF FOR THE UNITED STATES

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1. Respondents argue (Br. in Opp. 11-24)[1] that the Ninth Circuit has not adopted a co-conspirator exception to traditional rules of Fourth Amendment standing. As we demonstrated in our petition (Pet. 8), however, it is plain that the Ninth Circuit has adopted such an exception and has applied that exception in a host of cases. As the court of appeals stated in this case, the Ninth Circuit has "consistently held that a coconspirator's participation in an operation or arrangement that indicates joint

[1] Citations to "Br. in Opp." are to the brief in opposition filed on behalf of, and signed by counsel for, all the respondents (except respondent Warren Strubbe, who is a party in this Court under Sup. Ct. R. 12.4). In addition, respondent Donald Simpson filed a *pro se* brief in opposition.

control and supervision of the place searched establishes standing." Pet. App. 9a.

Respondents contend (Br. in Opp. 17-18) that our position is refuted by the Ninth Circuit's disclaimer of a "co-conspirator exception of general applicability," *United States* v. *Taketa*, 923 F.2d 665, 672 (1991). To the contrary, that disclaimer—in recognizing a more limited "co-conspirator exception" to traditional rules of Fourth Amendment standing, *ibid.*—conclusively demonstrates our point. As we pointed out in the petition (Pet. 9-11), it is true that the Ninth Circuit has limited the sweep of its co-conspirator exception so as to require a defendant to have a position of control within the conspiracy. That does not in any way undermine our claim of conflict, however, because it is undeniably true that the Ninth Circuit is alone in treating membership in a conspiracy as pertinent to the Fourth Amendment analysis. Respondents cite no case (and we are aware of none) from any court outside the Ninth Circuit that treats membership in a conspiracy—whether accompanied by control or not—as a relevant Fourth Amendment factor. See Pet. 13-16.[2]

2. The Ninth Circuit's approach is also contrary to this Court's consistent admonition "that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas* v. *Illinois*, 439 U.S. 128, 133 (1978), quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969).

[2] Respondents discuss (Br. in Opp. 24-29) several cases from other circuits that, in their view, show that the other courts of appeals decide cases presenting questions of co-conspirator standing consistently with the Ninth Circuit's approach. That contention is without basis. No case cited by respondents treats membership in a conspiracy as relevant to the Fourth Amendment analysis.

See also *United States* v. *Payner*, 447 U.S. 727, 731 (1980). This Court has made plain that "[c]oconspirators and codefendants have been accorded no special standing" to assert Fourth Amendment violations. *Alderman*, 394 U.S. at 172. See also *Standefer* v. *United States*, 447 U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973). No decision by this Court treats membership in a conspiracy—even if the individual involved is centrally responsible for the conspiracy—as relevant for purposes of Fourth Amendment standing. The Ninth Circuit's analysis accordingly cannot be squared with this Court's Fourth Amendment standing decisions.

3. Respondents argue (Br. in Opp. 36-39) that the Ninth Circuit's decision in this case is correct even without considering their roles in the conspiracy. The courts below concluded, however, that Xavier Padilla and the Simpsons had standing based on their roles in the conspiracy, and did not analyze whether they had a Fourth Amendment interest that was implicated on some other basis by the stop of Arciniega.[3] The court held that the Simpsons' "coordinating and supervising" roles in the "operation" gave them standing. Pet. App. 12a-13a. As to Xavier Padilla, the court thought that it was "inconsequential that he was not present at the stop [and] was unable to exclude others from inspecting the vehicle," because he was "the man in charge [of the] so-

[3] With respect to respondents Jorge and Maria Padilla, the court of appeals remanded to the district court to determine whether their level of "responsibility in the joint venture" was sufficient to give them standing, or whether they were "mere employees" in the operation. Pet. App. 15a. The court did not consider relevant whether they had an actual Fourth Amendment interest in the stop or search of the vehicle, but rather thought that their standing depended on their role in the conspiracy.

phisticated operation." *Id.* at 13a. As we argued in the petition (Pet. 11), the decision below therefore stands or falls on the validity of the Ninth Circuit's doctrine of co-conspirator standing.[4]

In any event, we believe it is clear that under traditional Fourth Amendment analysis, none of the respondents had standing to challenge the stop in this case.[5] The only person whose freedom of movement was affected in any way by the stop was Arciniega, the driver of the vehicle. None of the respondents was present at the time of the stop, and respondents fail to suggest any way in which the stop implicated their right to be free from unreasonable seizures. That conclusion is no different with respect to respondents Donald and Sylvia Simpson simply because they were the owners of the vehicle. It is well established that ownership is not determinative of a

[4] To be sure, the court of appeals did consider (see Pet. App. 9a-14a) factors in addition to respondents' roles in the conspiracy. The court of appeals did not suggest, however, that those factors were sufficient to give any respondent a Fourth Amendment interest irrespective of the conspiracy. The decision of the district court was even more explicit, stating with respect to all the respondents except the Simpsons that their standing was based "solely [on] the joint venture." *Id.* at 23a.

[5] Respondents err in treating the search of the vehicle as relevant to the Fourth Amendment analysis in this case. It is clear from both the district court's (Pet. App. 25a-29a) and the court of appeals' (Pet. App. 17a-21a) decisions that the only illegality here was in the initial decision to stop the vehicle. To be sure, the lower courts found the cocaine that was discovered during the subsequent consensual search of the vehicle to be inadmissible, but not because that search was independently illegal; rather, the courts found that the discovery of the evidence in the vehicle was the product of the illegal stop. See Pet. App. 17a-21a, 31a-34a. Neither court concluded that the search of the trunk constituted an independent Fourth Amendment violation.

Fourth Amendment interest in seized property. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980); *United States* v. *Salvucci*, 448 U.S. 83, 91-92 (1980). The brief traffic detention of the Simpsons' vehicle, over which they had ceded unqualified control to Arciniega, had absolutely no effect on any expectation of privacy they might have retained in the vehicle. The consensual search of the trunk also did not affect their Fourth Amendment interests, as the record does not reflect that the Simpsons took any steps to maintain an expectation of privacy in the trunk when they released the car to Arciniega.

4. Finally, respondents contend (Br. in Opp. 39-40) that this case is a poor vehicle for resolving the validity of the Ninth Circuit's co-conspirator exception to this Court's rules of Fourth Amendment standing. To the contrary, as we pointed out in the petition (Pet. 16-17), this case is a particularly appropriate candidate for review, inasmuch as the "co-conspirator exception" was invoked to support the court's standing analysis with respect to all six respondents. Four of the respondents (the three Padillas and Warren Strubbe) have no arguable Fourth Amendment interest that was implicated by the stop of the vehicle apart from their roles in the conspiracy. With respect to the Simpsons, the court of appeals relied at least in part on their "participat[ion] in the organization," Pet. App. 12a, to give them standing. If the Ninth Circuit's "co-conspirator standing" rule is wrong, the government is entitled, at the least, to have the standing issue as to the Simpsons decided without reference to that factor.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

(4)

No. 92-207

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER V. PADILLA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether membership in a joint venture to transport drugs gives co-conspirators a privacy or property interest entitling them to challenge the investigatory stop of one of the members of the conspiracy, and the subsequent search of the car he was driving.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 960 F.2d 854. The oral rulings and minute orders of the district court (Pet. App. 22a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1992. On June 23, 1992, Justice O'Connor entered an order extending the time for filing a petition for a writ of certiorari to and including July 30, 1992. The petition for a writ of certiorari was filed on July 30, 1992, and was granted on November 2, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

An indictment returned in the United States District Court for the District of Arizona charged respondents with conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In addition, respondent Xavier Padilla was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. The district court granted respondents' motions to suppress most of the evidence in the case. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-21a.

1. On September 26, 1989, Officer Russell Fifer of the Arizona Department of Public Safety was patrolling on Interstate Highway 10 near Casa Grande, Arizona, when a Cadillac passed him. Although the Cadillac was initially traveling 65 to 70 miles per hour, it slowed to 50 miles per hour as it passed the officer. The driver appeared to be acting suspiciously, so the officer followed the car for several miles. Due to a miscommunication, the police radio

dispatcher informed Officer Fifer that the license plates on the Cadillac were registered to a different make of car. Officer Fifer signaled the driver of the Cadillac to stop, and the car pulled over. Pet. App. 2a-3a; 5/8/90 Tr. 132-139, 143-145.

Luis Arciniega was the driver and sole occupant of the car. He furnished Officer Fifer a driver's license in his own name and an insurance card in the name of respondent Donald Simpson. Another officer, who was assisting Officer Fifer, asked Arciniega for permission to search the car for weapons or contraband, and Arciniega consented. The officer opened the trunk and discovered 560 pounds of cocaine. Officer Fifer then arrested Arciniega. During the course of the stop, Officer Fifer learned from the radio dispatcher that the initial license plate information was incorrect and that the plates were in fact registered to a Cadillac owned by respondent Donald Simpson. Pet. App. 3a-4a; 5/15/90 Tr. 91-96.

After his arrest, Arciniega agreed to make a controlled delivery of the cocaine. He made a telephone call from a motel in Tempe, Arizona, and shortly thereafter respondents Jorge and Maria Padilla came to the motel. The Padillas were arrested when they tried to drive away in the Cadillac. Maria Padilla then agreed to cooperate with the officers and led them to a house in which respondent Xavier Padilla was staying. Pet. App. 4a-5a.

Law enforcement authorities learned that the cocaine-laden Cadillac belonged to a United States Customs agent, Donald Simpson. The investigation linked Simpson and his wife, respondent Maria Sylvia Simpson, to Xavier Padilla. The authorities ultimately concluded that the Simpsons and Xavier Padilla were the principals in a large drug smuggling

operation engaged in transporting drugs from Mexico on behalf of distributors who owned the drugs. DEA agents conducting a related investigation were able to link respondent Warren Strubbe to the conspiracy, and they discovered another 440 pounds of cocaine, which had been unloaded from the Simpsons' Cadillac shortly before Arciniega's arrest. Pet. App. 5a-7a; C.A. Excerpt of Record Doc. 259, at 4-8.

2. Prior to trial, respondents moved to suppress all the evidence discovered in the course of the investigation. They claimed that the evidence was the fruit of the stop of Arciniega, which they argued was unlawful. The district court ruled that respondents had a legitimate Fourth Amendment interest in the stop of Arciniega, and that they were therefore entitled to press their claim that the stop was illegal. The court based that ruling on its determination that respondents were involved in "a joint venture for transportation" of the contraband "that had control of the contraband" at the time of the stop. Pet. App. 22a. The court concluded that the Simpsons retained a Fourth Amendment interest in the trunk of their car and that Xavier Padilla, Maria Padilla, and Jorge Padilla were entitled to challenge the stop based "solely [on] the joint venture aspect" of the case. *Id.* at 23a.

At the conclusion of the suppression hearing, the district court ruled that Officer Fifer lacked reasonable suspicion to stop Arciniega.[1] Pet. App. 25a. The court therefore granted the motion to suppress. *Id.* at 29a, 30a. The court further concluded that "[h]ad there not been a stop, it is clear * * * none

[1] The correctness of that ruling is not at issue in this Court.

of [the] investigation would have transpired." *Id.* at 34a. The court therefore suppressed all the evidence obtained during the course of the investigation. *Id.* at 31a-32a, 33a-34a.

3. The court of appeals affirmed the suppression order as to respondents Xavier Padilla, Donald Simpson, and Maria Simpson; it remanded for further findings with respect to respondents Jorge and Maria Padilla; and it reversed as to respondent Warren Strubbe.

a. In finding that the Simpsons and Xavier Padilla were entitled to challenge the stop of Arciniega, the court relied on a line of Ninth Circuit cases holding that leaders or supervisors of a joint criminal venture enjoy a legitimate privacy interest in the persons or places involved in the conspiracy by virtue of their role in the joint venture. Pet. App. 9a-11a. The court of appeals therefore assessed respondents' roles in the venture to determine whether they exercised sufficient ownership and control over the operation to give them "standing" to challenge the stop.

The Simpsons and Xavier Padilla had standing, the court concluded, "not simply because the Simpsons owned the car and jointly possessed the drugs with Xavier but also because they participated in the organization, particularly on the day of the stop." Pet. App. 12a.[2] Donald Simpson had standing because "[h]e was a critical player in the transportation scheme who was essential [because of his status as a Customs agent] in getting the drugs across the border." *Ibid.* Maria Simpson had standing, the court

[2] Donald Simpson held title to the vehicle, and Maria Sylvia Simpson claimed an ownership interest based on her community property rights. See 5/8/90 Tr. 73-74; Resp. C.A. Br. 9.

held, because she played "a supervisory role tying everyone together and overseeing the entire operation at least from the Mexico end." *Id.* at 12a-13a. Xavier Padilla had standing because he "exhibited substantial control and oversight with respect to the purchase [of the drugs] in Mexico and * * * the transportation through Arizona." *Id.* at 13a. In assessing his standing, the court concluded, "[i]t is inconsequential that he was not present at the stop nor that he was unable to exclude others from inspecting the vehicle." *Ibid.*

With respect to respondents Jorge and Maria Padilla, who attempted to pick up the cocaine-laden Cadillac following Arciniega's arrest, the court of appeals held that it was unable to determine from the record whether they were "responsible partners of the venture or mere employees in a family operation." Pet. App. 15a. The court noted that they "did not control the drugs yet they were an integral part of the formalized business arrangement that did." *Id.* at 14a. Because it was not clear from the record whether "they shared any responsibility for the enterprise," *ibid.*, the court remanded for further findings on that point.

Finally, the court held that respondent Warren Strubbe lacked standing, because he "demonstrated no active control or supervision over the drugs or the vehicle involved in this conspiracy." Pet. App. 15a-16a.

b. Having rejected the government's argument that none of the respondents had any Fourth Amendment interest implicated by the stop of Arciniega, the court of appeals held that the unlawful stop justified the suppression of almost all the evidence discovered in the course of the ensuing investigation as the fruit

of the unlawful stop. Pet. App. 17a-21a. The only evidence that the court of appeals held not to be suppressible was the statement of a witness who came forward more than two weeks after the stop of Arciniega and provided information about Xavier Padilla and Donald Simpson. *Id.* at 20a. The primary evidence in the case, the 1000 pounds of cocaine, was ordered suppressed as to those respondents with standing.

SUMMARY OF ARGUMENT

The investigatory stop of Luis Arciniega, the drug courier, did not violate the Fourth Amendment rights of any of the respondents. None was a victim of the traffic stop of Arciniega, which violated his rights alone. Under traditional principles of Fourth Amendment law, defendants are not entitled to seek suppression of evidence seized as a result of the violation of a third party's rights. In this case, however, the Ninth Circuit held that respondents could obtain suppression of the cocaine Arciniega was transporting, as well as other evidence developed in the course of the investigation, under that court's "co-conspirator exception" to the traditional rules of Fourth Amendment standing. Applying the "co-conspirator exception," the court of appeals held that those respondents with a supervisory role in the conspiracy were entitled to challenge the stop of Arciniega because they had an interest, as joint venturers, in the success of Arciniega's mission and a possessory interest in the cocaine he was carrying.

The "co-conspirator exception" conflicts with the principles of Fourth Amendment standing announced by this Court. This Court has made it quite plain that a defendant may not seek suppression of evi-

dence seized in violation of the Fourth Amendment unless he was a victim of the illegal search or seizure. The introduction of illegally seized evidence at trial does not make a defendant a "victim" for this purpose if the defendant was not one whose personal Fourth Amendment rights were violated when the evidence was obtained. That means that the police must have invaded some privacy or property interest of the defendant in order for the defendant to be entitled to challenge the search or seizure. It is not enough that the police invaded the rights of one of the defendant's co-conspirators or that the police conduct interfered with the success of the criminal venture of which the defendant was a part.

Respondents argue that they are entitled to challenge the stop of Arciniega under traditional principles of Fourth Amendment standing. First, they suggest that the Simpsons are entitled to standing because they were the owners of the car that Arciniega was driving. The temporary traffic stop of Arciniega, however, did not invade any privacy or property interest in the car that the Simpsons retained when they entrusted it to Arciniega. The temporary detention of Arciniega did not meaningfully deprive the Simpsons of the use of the car, and the record does not reflect that the Simpsons took steps to ensure the privacy of the trunk of the car that would protect them against Arciniega's decision to consent to a search of the trunk.

Second, respondents argue that they had a possessory interest in the cocaine that was violated by the police conduct in this case. Even if respondents are regarded as having acquired a possessory interest in the cocaine, however, that interest does not accord them standing to challenge the stop of Arciniega.

Because respondents had no legal right to possess the cocaine, its seizure did not deprive them of any lawful possessory interest in the drugs. In any case, the brief detention of the cocaine occasioned by the stop of the car in which it was being carried did not meaningfully interfere with whatever possessory interests respondents might have had. Ownership of property found in a particular place does not give the owner a privacy interest in that place; and once the police encountered the cocaine in the car trunk, the respondents' possessory rights, whatever they were, gave way to the officers' superior right to seize the contraband.

Finally, there is no force to Xavier Padilla's argument that he was entitled to challenge the stop of Arciniega because he was Arciniega's direct supervisor and was monitoring the progress of the shipment of cocaine as it traveled through Arizona from Mexico. Padilla's supervisory role and close attention to Arciniega's progress indicates that Padilla was very interested in the fate of the cocaine, and no doubt was very disappointed to learn that it had been intercepted. But that does not mean that the stop of Arciniega in any way invaded Xavier Padilla's personal right to be free from unreasonable searches and seizures. The illegal arrest or search of a son or daughter of Padilla's whom he supervised closely would no doubt be a matter of grave concern to him, but such a seizure or search would nonetheless not be a violation of Padilla's own Fourth Amendment rights, and would not give him standing to challenge the search or seizure through invocation of the exclusionary rule in a criminal case.

In sum, the court of appeals erred by permitting respondents to challenge the stop of Arciniega based

on their positions of supervision and control within the drug smuggling conspiracy, and their standing to challenge the stop cannot be sustained on any other ground.

ARGUMENT

BECAUSE THE STOP OF ARCINIEGA DID NOT IMPLICATE RESPONDENTS' FOURTH AMENDMENT RIGHTS, THEY MAY NOT OBTAIN SUPPRESSION OF THE EVIDENCE SEIZED AS A RESULT OF THE STOP

The stop of the car driven by Luis Arciniega affected no Fourth Amendment interest of any of the respondents. None of the respondents was present at the stop, and none had his freedom of movement affected by the stop. The court of appeals nonetheless permitted respondents to challenge the legality of the stop on the theory that they were joint venturers in the transportation of the drugs Arciniega was carrying in the trunk of the car. In so doing, the court of appeals followed a long line of Ninth Circuit decisions extending Fourth Amendment standing to participants in a criminal scheme because of their status as joint venturers. That court has treated participation in a criminal conspiracy as sufficient to give rise to a privacy interest in a place searched, or a property interest in items seized, if the defendant's role in the conspiracy afforded him supervisory responsibility over the premises searched or the property seized. Pet. App. 9a-11a.[3]

[3] See *United States* v. *Johns*, 851 F.2d 1131, 1135-1136 (1988); *United States* v. *Broadhurst*, 805 F.2d 849, 851-852 (1986); *United States* v. *Quinn*, 751 F.2d 980, 981 (1984), cert. granted, 474 U.S. 900 (1985), cert. dismissed, 475 U.S. 791 (1986); *United States* v. *Pollock*, 726 F.2d 1456, 1465 (1984); *United States* v. *Johns*, 707 F.2d 1093, 1100 (1983), rev'd on other grounds, 469 U.S. 478 (1985); *United States* v. *Perez*, 689 F.2d 1336, 1338 (1982).

We submit that the Ninth Circuit's "co-conspirator exception" to the traditional principles of Fourth Amendment standing, *United States* v. *Taketa*, 923 F.2d 665, 672 (9th Cir. 1991), cannot be reconciled with principles of Fourth Amendment standing announced by this Court. In particular, the Ninth Circuit's approach is irreconcilable with the settled principle that Fourth Amendment violations are personal and that only those whose own rights have been invaded by a search or seizure may seek suppression of evidence obtained as a result of that violation.

Once respondents' participation in the conspiracy is removed from the Fourth Amendment calculus, it is clear under this Court's decisions that no other circumstance—including the Simpsons' ownership of the stopped car, any possessory interest respondents may have had in the seized cocaine, or any role the respondents may have had in directing Arciniega's movements—affords respondents standing to challenge the stop.

A. To Obtain Suppression Of Evidence, A Defendant Must Show That The Challenged Conduct Invaded His Own Fourth Amendment Interests

Traffic stops are "seizures" within the meaning of the Fourth Amendment. Accordingly, such stops must satisfy the Fourth Amendment's requirement of reasonableness. See, *e.g.*, *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 450 (1990); *Berkemer* v. *McCarty*, 468 U.S. 420, 436-437 (1984); *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979). The principal

issue at the suppression hearing in this case was whether Officer Fifer's decision to stop the car Arciniega was driving was supported by a reasonable suspicion of unlawful activity. See *Berkemer* v. *McCarty*, 468 U.S. at 439; *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985); *Terry* v. *Ohio*, 392 U.S. 1 (1968). The district court concluded that the stop was unsupported by reasonable suspicion and therefore constituted an unlawful seizure that violated Arciniega's Fourth Amendment rights. See Pet. App. 25a-29a.[4] The government did not challenge that ruling on appeal and we do not do so here. The question at this point in the case is a separate one: whether the illegal stop went beyond violating Arciniega's rights and violated the Fourth Amendment rights of the five respondents.

One fundamental principle, long established in this Court's cases, guides the analysis of that question. A defendant's Fourth Amendment rights "are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980). That principle follows from the general rule that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978), quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). In short, in order to obtain suppression, a person must

[4] Neither the district court nor the court of appeals held, or even intimated, that the subsequent consensual search of the vehicle and its trunk constituted a separate Fourth Amendment violation. Rather, the lower courts concluded that the cocaine found in the trunk had to be suppressed because it was a tainted fruit of the unlawful stop.

be "a victim of a search or seizure" rather than one "who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones* v. *United States*, 362 U.S. 257, 261 (1960); see also *United States* v. *Payner*, 447 U.S. at 735; *Alderman* v. *United States*, 394 U.S. at 173; *Goldstein* v. *United States*, 316 U.S. 114, 120 (1942).

That principle is based on this Court's recognition that it would impose undue costs on the criminal justice system to permit an individual whose rights have not been violated to have the evidence against him suppressed. Because the exclusion of probative evidence "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case," *United States* v. *Payner*, 447 U.S. 727, 734 (1980), the Court has restricted application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." *Ibid.*, quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). The Court has stated that it is "beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." *Payner*, 447 U.S. at 735. See *Simmons* v. *United States*, 390 U.S. 377, 389 (1968); *Wong Sun* v. *United States*, 371 U.S. 471, 492 (1963); *Alderman*, 394 U.S. at 174-175.

The Court has also made it clear that the defendant, as "[t]he proponent of a motion to suppress[,] has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas*, 439 U.S. at 131 n.1. In order to prevail, the defendant must show "not only that the search * * * was illegal, but also that he had

a legitimate expectation of privacy in [the area that was searched or the item that was seized]." *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *Jones* v. *United States*, 362 U.S. at 261. Thus, respondents are not entitled to complain about the illegal seizure in this case unless they can demonstrate that the seizure violated their personal Fourth Amendment rights.

B. Respondents' Co-Conspirator Status Did Not Give Rise To A Privacy Or Property Interest That Was Affected By The Stop Of Arciniega

Rather than following the mandate of this Court's cases and analyzing the way in which the respondents' Fourth Amendment interests may have been implicated by the traffic stop of Arciniega, the court of appeals invoked its co-conspirator exception to the traditional rules of Fourth Amendment standing. In accordance with circuit precedent, the court of appeals focused on each respondent's role in the conspiracy and granted or denied each one standing based on his or her degree of involvement in the scheme. Because the Simpsons and Xavier Padilla were "critical player[s]" (Pet. App. 12a) in the joint venture, with "supervisory role[s]" (*ibid.*) that called for their "substantial control and oversight" over the criminal enterprise (*id.* at 13a), the court found that they had legitimate privacy interests that were invaded by the stop of Arciniega. With respect to Jorge and Maria Padilla, although they were "active members" (*id.* at 14a) who were an "integral part" (*ibid.*) of the criminal venture, the court found that it was unclear whether they "shared any responsibility" (*ibid.*) for the enterprise; accordingly, the court remanded for the district court "to determine whether they were responsible partners of

the venture or mere employees." *Id.* at 15a. Finally, the court denied Warren Strubbe standing because he had "no active control or supervision over the drugs or the vehicle involved in this conspiracy." *Id.* at 16a.

By focusing on each respondent's role in the drug importation scheme, rather than on whether each was the victim of an illegal seizure, the court of appeals committed a fundamental error. Under settled Fourth Amendment principles, a defendant's status as a co-conspirator—no matter how significant his role in the conspiracy—is irrelevant to the question whether his Fourth Amendment rights have been violated. Only a person whose privacy or property interests were affected by a seizure may contest its lawfulness, see *Alderman*, 394 U.S. at 172-173; *Wong Sun*, 371 U.S. at 491-492; 4 Wayne R. LaFave, *Search and Seizure* §§ 11.3, 11.3(i), at 280-283, 359-362 (2d ed. 1987). An individual's Fourth Amendment interests are not affected by a seizure simply because a co-conspirator has been arrested or the contraband that is the subject of the smuggling conspiracy has been seized.

In analyzing whether a defendant's Fourth Amendment rights are implicated, the defendant's status as a co-conspirator cannot create an expectation of privacy where one otherwise would not exist. The fact that a defendant acts in league with others to accomplish the ends of a joint venture has no bearing on the basic Fourth Amendment question—whether law enforcement officers violated the defendant's right to be free from unreasonable seizures of his person, property, or premises.

Alderman v. *United States* stands for precisely that point. In that case, the defendants urged "that if evidence is inadmissible against one defendant or

conspirator, because tainted by electronic surveillance illegal as to him, it is also inadmissible against his codefendant or co-conspirator." 394 U.S. at 171. In rejecting that argument, this Court held that "[c]o-conspirators and codefendants have been accorded no special standing" under the Fourth Amendment. *Id.* at 172. The Court relied on the "established principle * * * that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 171-172.

Brown v. *United States*, 411 U.S. 223 (1973), is also instructive. In that case, the defendants were convicted of transporting and conspiring to transport stolen goods to their co-conspirator, Knuckles, whose retail store was searched pursuant to a defective warrant while the defendants were in custody in another State. The defendants moved to suppress the evidence seized at the store, arguing that they had a property interest in the stolen goods by virtue of their conspiratorial relationship wtih Knuckles. This Court held that the defendants lacked any cognizable Fourth Amendment interest, pointing out that they were not on the premises at the time of the search and had no proprietary or possessory interest in the store. *Id.* at 229. The Court also rejected the argument that the conspiracy gave the defendants standing, without deciding whether co-conspirator status could ever establish standing. *Id.* at 230 n.4. The court characterized as "doubtful" the assumption that "the alleged conspiracy between [defendants] and Knuckles could support a 'constructive possession' of the merchandise at Knuckles' store," but the Court noted that in any event the defendants' "property interest" in the stolen merchandise was "totally illegitimate." *Ibid.*

No court other than the Ninth Circuit has accepted the notion that a person's role in a joint venture can give rise to a legitimate Fourth Amendment interest in a search or seizure affecting other members of the conspiracy.[5] The lower courts have recognized that the Ninth Circuit stands alone in treating membership in a conspiracy as relevant to Fourth Amendment analysis, see *United States* v. *Kiser*, 948 F.2d at 424, and that the Ninth Circuit's approach is "indistinguishable from the discredited co-conspirator" standing arguments rejected by this Court. *United States* v. *Gerena*, 662 F. Supp. 1218, 1245, 1247 n.30 (D. Conn. 1987); see also *United States* v. *Little*, 735 F.2d 1049, 1053 ("Neither [a defendant's] mere presence in the conspiracy nor the acts of his co-conspirators can give him a legitimate expectation [of privacy] * * * where none exists otherwise."), rev'd on other grounds, 743 F.2d 1261 (8th Cir. 1984), cert. denied, 469 U.S. 1217 (1985).

In addition to being inconsistent with the decisions of this Court and other courts of appeals, the Ninth Circuit's recognition of joint venture standing can dramatically increase the cost of suppressing evidence in conspiracy cases. This case illustrates that point. Because a single conspirator was unlawfully stopped,

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[5] See, *e.g.*, *United States* v. *Kiser*, 948 F.2d 418, 424 (8th Cir. 1991), cert. denied, 112 S. Ct. 1666 (1992); *United States* v. *Soule*, 908 F.2d 1032, 1036-1037 (1st Cir. 1990); *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985); *United States* v. *Brown*, 743 F.2d 1505, 1506-1507 (11th Cir. 1984); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981); *United States* v. *Davis*, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980); *United States* v. *Galante*, 547 F.2d 733, 739 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Hunt*, 505 F.2d 931, 942 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975).

the courts below have suppressed virtually all of the evidence against the leaders of the enterprise, including a corrupt law enforcement official, and have effectively terminated their prosecutions on serious drug trafficking charges—all despite the fact that they were not the persons seized in the highway stop. Whatever the additional benefits of extending the exclusionary rule to co-conspirators may be, they do not justify such a "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman*, 394 U.S. at 174-175.[6]

Not only does the Ninth Circuit's doctrine impose great costs on the criminal justice system, but it does so in a particularly perverse fashion. To take advantage of the unlawful search or seizure of a co-conspirator, a defendant in the Ninth Circuit must demonstrate that he had a leadership or central role in the conspiracy. The most culpable participant in such an operation—like Xavier Padilla or the Simp-

[6] To illustrate how sweeping the Ninth Circuit's rule can be, suppose that the police illegally seize an address book from A. Using information obtained from the address book, they subsequently conduct lawful searches of the residence of B, the leader of the conspiracy, and discover cocaine during the course of that search. Under the Ninth Circuit's co-conspirator doctrine, B has a Fourth Amendment interest in the seizure of the address book from A, and may obtain suppression of all the evidence against him because it was discovered as the fruit of the unlawful seizure of the address book. Indeed, if the seizure of A's address book led to the lawful discovery of other evidence in the possession of other, unrelated persons, B would still be entitled to suppression of that evidence as the fruit of the unlawful seizure of the book from A, despite the fact that B had absolutely no privacy interest that was invaded by the discovery of any of the evidence.

sons—may therefore be effectively immunized from prosecution, while a relatively minor figure such as Strubbe is left to face the full brunt of the government's evidence. The doctrine thus has the anomalous result of rewarding conspirators for assuming a leading role in the conspiracy. To permit respondents to move to suppress evidence based on a challenge to a stop—even though they had no Fourth Amendment interest implicated in the stop—is an unsupported and unsound rule that serves only to confer a Fourth Amendment windfall on defendants like respondents.

C. Respondents Failed To Establish Any Privacy Or Property Interest That Was Affected By The Stop Of Arciniega

The court of appeals' standing decision turned on whether respondents were principals in the drug-trafficking conspiracy. The court therefore did not decide whether any other ground was sufficient to afford respondents standing, although it did note that the Simpsons' ownership of the stopped car was relevant to the Fourth Amendment analysis. Pet. App. 12a. When respondents' membership in the conspiracy is put aside, it is plain that there is no basis for finding that their personal rights were implicated by the illegal stop of Arciniega. Respondents' freedom of movement obviously was not affected by the stop of the car Arciniega was driving. None of the respondents were in the car at the time of the stop. They were therefore not affected in any legally cognizable way by the investigatory stop of Arciniega, since the interests in being free from a suspicionless vehicle stop "are personal to the driver and passengers in the car stopped, who have their travel interrupted * * * [and] are detained on the side of the road." *United States* v. *Powell*, 929 F.2d 1190, 1195 (7th Cir.), cert. denied, 112 S. Ct. 584 (1991).

The stop of Arciniega was the sole Fourth Amendment violation found by the district court and the court of appeals. Those courts ordered suppression of the cocaine found in the trunk of the car and the other evidence seized after the stop because that evidence was deemed to be the fruit of the illegal stop. Neither court found any independent illegality in the search of the trunk or in any of the other investigative steps taken in this case. The search of the trunk was undertaken pursuant to Arciniega's consent, and the courts did not find that his consent was involuntary. Once the police discovered the cocaine in the trunk of the car, their right to seize the contraband overrode any possessory interest respondents might have had in the drugs. See *Horton* v. *California*, 496 U.S. 128 (1990); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983).

Because the only Fourth Amendment violation identified by the district court and the court of appeals was the stop of the car, the judgment in this case can be upheld under traditional principles of Fourth Amendment standing only if respondents can show that the stop affected their personal Fourth Amendment interests.[7] They attempt to do so in three ways:

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[7] Respondents cannot challenge the admission of the cocaine against them on the ground that its discovery was the fruit of a violation of Arciniega's Fourth Amendment rights. It is a logical corollary of the Fourth Amendment standing doctrine that a defendant "can prevail on a 'fruit of the poisonous tree' claim only if he has standing regarding the violation which constitutes the poisonous tree." 4 Wayne R. LaFave, *Search and Seizure* § 11.4, at 371 (2d ed. 1987) (citation omitted). See *Wong Sun*, 371 U.S. at 491-492; *Goldstein* v. *United States*, 316 U.S. at 121 (defendant cannot move to suppress evidence obtained through exploitation of illegal search if the defendant did not have standing to object to the search); *United States* v. *Soule*, 908 F.2d at 1037 (same).

by relying on the Simpsons' ownership of the car; by asserting that all the respondents had a possessory interest in the cocaine because of their roles in the conspiracy; and by relying on Xavier Padilla's role as Arciniega's immediate supervisor in the transportation operation. See Xavier Padilla Br. in Opp. 37-38. None of those interests is sufficient to grant respondents the right to obtain suppression of the evidence under the Fourth Amendment principles set forth by this Court.

1. ***The Simpsons' Ownership Interest In The Car.*** The stop of Arciniega, as distinct from the consensual search of the car's trunk, did not meaningfully interfere with the Simpsons' property or privacy interests as owners of the car. As the Seventh Circuit has stated, "a vehicle owner who is not in his car at the time it is stopped should not, absent unusual circumstances * * *, have standing to object to the stop." *United States* v. *Powell*, 929 F.2d at 1195. Although "[i]t is conceivable that a stop might implicate a[n absent] vehicle owner's possessory interests, as where the stop meaningfully deprives the vehicle owner of the anticipated use of his car," *ibid.*, no such circumstances are present in this case.

The Simpsons entrusted the car to Arciniega for a significant period of time; they did not indicate at the suppression hearing when, if ever, Arciniega was expected to return the car.[8] Under those circumstances, the Simpsons cannot possibly be found to

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[8] In fact, the Simpsons falsely reported the vehicle stolen soon after Arciniega's arrest. See 5/8/90 Tr. 83-84, 97.

have met their burden of showing that the brief traffic stop in this case interfered with their possessory interests in the car. To be sure, the temporary investigatory stop in this case ultimately ripened into an arrest of Arciniega and a seizure of the car. But that was because of the discovery of the cocaine in the trunk, which fully justified the arrest and seizure. Unless the Simpsons have standing to object to the investigatory stop, they cannot object to the ultimate seizure of the car any more than they could object if the police had developed probable cause to search and seize the car by conducting an unlawful search of Arciniega's home.

A theoretical delay in the ultimate return of the car does not give the owners of the car who have entrusted it to a third party the right to challenge a brief investigatory stop of the third party. A delay in the return of the car would have resulted if Arciniega had been stopped for questioning while he was eating at a roadside restaurant or staying at a motel along his route, yet the Simpsons plainly would have no protectible Fourth Amendment interest in those settings. The fact that Arciniega was in the car when he was stopped does not give the Simpsons (or the other respondents) any greater Fourth Amendment interest in the stop.

To take another example, respondents' right to object to the stop of Arciniega is no greater than the right that another member of the conspiracy would have to object to the stop if he had lent Arciniega a firearm to carry with him or a suit to wear during the trip and the stop had delayed return of the firearm or the suit. The delay in the return of the property would interfere, incrementally, with the owner's

right of possession, but that effect would not make the owner of the firearm or the suit a "victim of a search or seizure," *Jones* v. *United States*, 362 U.S. at 261.

As we have noted, neither the district court nor the court of appeals found that the search of the car's trunk was a separate violation of the Fourth Amendment. The fruits of the search were suppressed not because the search was itself unlawful, but only because the search was a product of the unlawful stop. Yet, even if the district court and the court of appeals had found an independent violation of the Fourth Amendment in the search of the trunk and had based their standing decision with respect to the Simpsons on that violation, the decision below would still be wrong, because the record does not reflect that the Simpsons retained a privacy interest in the trunk of the car at the time of the stop.

Nothing in the record indicates that, in turning the car over to Arciniega, the Simpsons took any steps to exclude Arciniega or anyone else from the trunk while the car was out of the Simpsons' custody and control. In these circumstances, "[t]he legitimate and reasonable expectation of privacy * * * attached to [Arciniega's] possession and not to [the Simpsons'] title," *United States* v. *Dall*, 608 F.2d 910, 915 (1st Cir. 1979), cert. denied, 445 U.S. 918 (1980). That is, the Simpsons abandoned their expectation of privacy in the car when they relinquished possession of it to Arciniega. See *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969) (by allowing his cousin to use his duffel bag, and by leaving it in his house, Frazier "assumed the risk" that his cousin would allow someone else to look inside). In similar situations, the federal courts repeatedly have held

that the owner of a car lacks Fourth Amendment standing to object to the search of the car while it is under a third party's control. See *United States* v. *Dunkley*, 911 F.2d 522, 526 (11th Cir. 1990), cert. denied, 111 S. Ct. 765 (1991); *United States* v. *One 1986 Mercedes Benz*, 846 F.2d 2, 4 (2d Cir. 1988); *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 448-450 (9th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); *United States* v. *Dall*, 608 F.2d at 914-915; *United States* v. *Dyar*, 574 F.2d 1385, 1390-1391 (5th Cir.), cert. denied, 439 U.S. 982 (1978); *United States* v. *Nunn*, 525 F.2d 958, 959 (5th Cir. 1976); *United States* v. *Mendoza*, 473 F.2d 692, 695-696 (5th Cir. 1973).

2. ***Respondents' Possessory Interest In The Cocaine.*** The temporary stop of the car likewise did not affect any possessory interest respondents had in the cocaine hidden in the trunk. First, for the same reasons that the mere stop of the car did not constitute an unreasonable seizure as to the Simpsons, the brief detention of the cocaine incident to the stop did not work a "meaningful interference with [respondents'] possessory interests" in the cocaine. *Soldal* v. *Cook County*, No. 91-6516 (Dec. 8, 1992), slip op. 5, quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984).

Second, because respondents were not legally entitled to possess the cocaine, the detention or seizure of the cocaine could not deprive them of any lawful possessory interest in the drugs. "Congress has decided—and there is no question about its power to do so—to treat the interest in 'privately' possessing cocaine as illegitimate." *United States* v. *Jacobsen*, 466 U.S. at 123; see also *Andreas*, 463 U.S. at 771; *United States* v. *Place*, 462 U.S. 696, 707

(1983); *Brown*, 411 U.S. at 230 n.4; cf. *Rakas*, 439 U.S. at 141 n.9 (no privacy interest in stolen car that was searched); *Jones* v. *United States*, 362 U.S. 257, 267 (1960) (persons wrongfully present in searched premises cannot claim privacy interest). A claimed proprietary interest in contraband thus is not protected by the Fourth Amendment and cannot give the "owner" standing to challenge the seizure of the drugs.[9]

Even if Arciniega's consent to search the trunk was invalid and the search of the trunk therefore constituted an independent Fourth Amendment vio-

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[9] See, *e.g.*, *United States* v. *Bentley*, 706 F.2d 1498, 1505 n.5 (8th Cir.), cert. denied, 464 U.S. 830 (1983); *United States* v. *Parks*, 684 F.2d 1078, 1083 n.7 (5th Cir. 1982); *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir.), cert. denied, 444 U.S. 847 (1979); *United States* v. *Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976); *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), cert. denied, 404 U.S. 834 (1971); *United States* v. *Bozza*, 365 F.2d 206, 223 (2d Cir. 1966).

We recognize that *United States* v. *Jeffers*, 342 U.S. 48 (1951), can be read to allow a suppression claim to be based on the defendant's interest in seized contraband. The decision in *Jeffers*, however, is properly understood as based on the defendant's legitimate expectation of privacy in the hotel room that was searched, an expectation that was not lost simply because the defendant used the room in part as a storage area for his narcotics. See *United States* v. *Salvucci*, 448 U.S. 83, 90-91 n.5 (1980); *Rakas*, 439 U.S. at 136. Insofar as *Jeffers* held that the defendant's possessory interest in the seized contraband was sufficient to confer "standing" to challenge the search, it is inconsistent with subsequent decisions of this Court and therefore is no longer authoritative.

lation, respondents' interest in the cocaine would not give them standing to challenge that search. This Court has specifically "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." *United States* v. *Salvucci*, 448 U.S. 83, 92 (1980). Thus, "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation." *Salvucci*, 448 U.S. at 91. See also *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980).[10]

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[10] The "unexamined assumption" (*Salvucci*, 448 U.S. at 90) that a possessory interest sufficient to prove criminal liability also suffices to confer a Fourth Amendment privacy interest was one of the premises of the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). In overturning that rule in *Salvucci*, the Court expressly rejected the contention "that possession of a seized good is the equivalent of Fourth Amendment 'standing.'" 448 U.S. at 93. Similarly, in *Rawlings* v. *Kentucky*, *supra*, decided the same day as *Salvucci*, the Court squarely held that a possessory interest in the items seized during a search does not establish a privacy interest in the area searched. 448 U.S. at 105-106.

The Court in *Rakas*, after explaining that casual visitors do not have a privacy interest in searched premises, went on to note that "[t]his is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." 439 U.S. at 142 n.11. This statement does not imply that a possessory interest in the items seized is sufficient, without more, to establish a privacy interest in the area searched that would enable the defendant to challenge the search. Rather, it simply reflects the general proposition, recognized elsewhere in *Rakas*, 439 U.S. at 143-144 & n.12; *id.* at 153 (Powell, J., concurring), that a person may challenge the seizure of his own property and that his use of an area as a repository for his personal effects may indicate that he has an expectation of privacy in that area. The statement is thus consistent with the Court's subsequent decisions in *Salvucci* and *Rawlings*.

As we discussed above, nothing in the record suggests that the Simpsons retained an expectation of privacy in the trunk of the car when they entrusted the car to Arciniega. And none of the other respondents had any interest in the car that could give rise to a privacy interest in the trunk. The respondents' possessory interest in the cocaine therefore did not give them standing to challenge either the seizure of the cocaine or the search of the trunk that led to that seizure.

3. Xavier Padilla's Supervisory Role With Respect to Arciniega. Respondents argue (Br. in Opp. 9, 37-38) that Xavier Padilla was directly supervising Arciniega as he transported the cocaine and that "care was taken to protect the cargo as it traveled through Arizona." Br. in Opp. 38. However, respondents did not acquire a Fourth Amendment interest in the security of Arciniega's person or the cocaine that they entrusted to him simply because they hired him to transport the contraband and directed his activities in that venture. Cf. *Rawlings* v. *Kentucky*, 448 U.S. 98, 105-106 (1980). Even if Padilla had been monitoring Arciniega's progress on a moment-to-moment basis, the stop of Arciniega would not have violated Padilla's Fourth Amendment rights. The stop would have been frustrating to Padilla, no doubt, but it would not have infringed his privacy or property rights any more than it would have infringed the rights of the sellers of the cocaine or the purchasers who were awaiting delivery and hoping for an uneventful transportation. Padilla

would be equally concerned, no doubt, about an unlawful arrest or search of a close friend or family member. But no matter how great the degree of his concern, he would not be entitled to challenge the search or seizure unless it were directed at him.

In any event, Xavier Padilla's supervisory role with regard to the transportation was not as intimate as he suggests, for even after Arciniega had been stopped and agreed to cooperate with the police, Xavier Padilla was not aware that the shipment had been intercepted. When Arciniega called Xavier Padilla at the officers' behest, Padilla assumed that the shipment had arrived and sent Maria and Jorge Padilla to pick up the car, apparently without noticing any delay in Arciniega's arrival. See 5/8/90 Tr. 70-73. Xavier Padilla's role as Arciniega's immediate supervisor therefore gave him no special ground for challenging the stop of Arciniega that led to the discovery of the cocaine that Arciniega was carrying.

* * * * *

The court of appeals in this case, as in other similar cases, conducted a detailed inquiry into the various roles played by the respondents in the conspiratorial venture. Those with leadership roles in the venture—the Simpsons and Xavier Padilla—were deemed to have standing because the court considered their roles to give them a sufficient continuing interest in the smuggling operation to be entitled to challenge the stop of Arciniega. Strubbe, who was a lesser figure in the conspiracy, was deemed not to have standing because of his less direct interest in the continuing success of the venture. And with respect to two of the respondents—Maria Padilla and Jorge Padilla—the court remanded for further findings to

determine whether their level of responsibility within the conspiracy was sufficiently great to accord them standing along with the Simpsons and Xavier Padilla.

By focusing on the degree of authority of the respondents within the conspiracy as a measure of their Fourth Amendment standing, the court of appeals has misapplied this Court's precedents. A traffic stop affects the rights of the driver and any passengers he may have. Persons who are not present are not "seized" within the meaning of the Fourth Amendment. Although the stopped vehicle and any personal property contained within it may be "seized" for the brief period of the temporary stop, the seizure of that property, while it is in the possession of a bailee, does not materially interfere with the possessory rights of the owners of either the vehicle or its contents. The principals in a drug smuggling operation therefore do not have standing to object to the stop of one of their couriers, even if they can be said to have control over the courier's movements and a possessory interest in the contraband the courier is carrying.

CONCLUSION

The judgment of the court of appeals should be reversed as to all the respondents except Warren Strubbe. As to Strubbe, the judgment should be affirmed.

Respectfully submitted.

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No. 92-207

In The
Supreme Court of the United States
October Term, 1992

United States of America,

Petitioner,

v.

Xavier V. Padilla, et al.,

Respondents,

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS XAVIER PADILLA, MARIA PADILLA AND JORGE PADILLA

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QUESTION PRESENTED

Contrary to Petitioner's suggestion, the question presented is not whether mere membership in a conspiracy alone entitles an individual to raise a Fourth Amendment challenge to the seizure and search of a coconspirator; the actual question presented is whether, under the totality of the circumstances, the evidence established that each Respondent's privacy or possessory rights were violated by the unlawful seizure and search at issue.

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STATEMENT OF THE CASE

I. Proceedings below

Respondents were each charged with one count of possession of cocaine with the intent to distribute (21 U.S.C. §841(a)(1)) and one count of conspiracy to commit that offense (21 U.S.C. §846) in a single indictment in the District of Arizona. Much of the evidence supporting the prosecution's case emanated from the seizure of an automobile owned by Respondents Maria Simpson and Donald Simpson and under the supervision of Respondent Xavier Padilla. A search of the trunk revealed wrapped packages; a search of the packages revealed cocaine. The district judge, Hon. Richard M. Bilby, found that the seizure of the car and its contents violated the Fourth Amendment and suppressed the evidence as to all six Respondents. Because that ruling disposed of the entire case, the

court was not called upon to decide the validity of the subsequent searches or Respondents' abilities to challenge those searches.

The government appealed to the Ninth Circuit Court of Appeals. Petitioner conceded that the seizure was illegal, but claimed that the seizure did not violate Respondents' rights. *United States v. Padilla*, 960 F.2d 854, 858 (9th Cir. 1992)(Pet. App. 1a-21a). After examining the evidence relevant to the privacy interests of each Respondent, the court concluded that the record was insufficient to determine whether the district court was correct in its finding that Respondents Maria Padilla and Jorge Padilla had the right to challenge the illegal seizure and therefore remanded the case for further evidentiary hearings. *Id.* at 861. The court held

that Respondent Warren Strubbe's rights were not implicated in the illegal seizure and reversed the suppression order as to him.[1] The court affirmed the suppression order as to Xavier Padilla, Maria Simpson and Donald Simpson. *Id.* at 860-861. The court did not address the search of the car or the packages found in the trunk.

II. Pertinent evidence

The evidence before the district court consisted of proffers and documents supplied by defense counsel. The government did not object to this procedure, nor did it present evidence in opposition.

Respondents' charges resulted from their participation in an ongoing cocaine

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[1]The court of appeals rulings regarding Maria Padilla, Jorge Padilla and Warren Strubbe are not contested here.

importation and transportation organization run by an individual known as "El Tejano". Xavier Padilla had worked for the organization for four or five years, transporting contraband from the border town of Douglas, Arizona to Phoenix; he would then return to Douglas with cash payments. On September 26, 1989, Xavier Padilla met with Maria Simpson and other principals in the "El Tejano" organization. They discussed bringing cocaine into the United States and through Arizona to California the next day, September 27. SER[2] at 3.

On the 27th, the cocaine was driven into the United States by Sylvia Simpson in a car she owned with her husband, Donald Simpson, a United States Customs

[2]Respondents' (Appellees') Supplemental Excerpt of Record in the court of appeals.

agent. *Id.* 3-5, 13; 960 F.2d at 860. Xavier Padilla had the "ultimate responsibility" for seeing that the car and its contents were successfully driven to Phoenix and on to California. 5/8/90 Tr. 70-73; 960 F.2d at 860. Xavier Padilla therefore left his home in Douglas, the town where the cocaine crossed the border, and travelled to Tempe, a suburb of Phoenix, approximately two hundred twenty miles away. He did so in order to be available should any problems arise during the trip to Phoenix. 5/8/90 Tr. 71; 5/30/90 Tr. 69-73, 106-111. Once the car had safely reached its final destination, Xavier Padilla was to return to Douglas with the payment for the contraband. SER 3, 14.

The first driver, Luis Arciniega, was hired by Xavier Padilla to drive the

car to Tempe, where he would be replaced by others for the remainder of the trip. 5/8/90 Tr. 71; SER 12-14. While in Tempe, Xavier Padilla was in regular telephone contact with another person in Douglas who was assisting in monitoring the car's progress. SER 3-5, 12-13. Arciniega was to call Xavier Padilla for instructions if any problems arose. 5/8/90 Tr. 70-73.

Arciniega was alone in the car when a state highway patrol officer illegally stopped it between Douglas and Tempe. A search of the trunk revealed packages wrapped in white paper, labeled "pollo", the Spanish word for chicken. SER 77. The police opened the packages and found cocaine.[3] Arciniega then agreed to

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[3]The validity of the search of the car and the search of the packages independent of the taint from the illegal initial seizure of the car and its

cooperate with the police. Both the car and Arciniega were taken to a motel in Tempe, where Arciniega - following prior instructions from Xavier Padilla - telephoned Mr. Padilla at his sister's house, which was also in Tempe. Arciniega told Xavier Padilla that the car had arrived safely, albeit late. *Id.* 70-71. Xavier Padilla immediately sent his wife and his brother, Respondents Maria Padilla and Jorge Padilla, to take the car from Arciniega. *Id.* 4. When the Padillas arrived at the motel and attempted to take the car, they were arrested. Following a lead from Maria, government agents went to Mr. Padilla's sister's home, where they located and spoke with Mr. Padilla.

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contents was never litigated or decided in the district court or the court of appeals.

In concluding that Mr. Padilla's Fourth Amendment rights were implicated by the seizure and search at issue, the court of appeals stated:

> Xavier Padilla, for his part, exhibited substantial control and oversight with respect to the transportation through Arizona. DEA Agent Plover testified to the Grand Jury that he believed that Xavier Padilla probably had ultimate responsibility for the contraband on the day of the stop.

960 F.2d at 860 & n. 4.

SUMMARY OF ARGUMENT

Respondents do not claim *per se* standing by virtue of their mere membership in a joint venture. The Ninth Circuit Court of Appeals analyzes standing from a totality of circumstances standpoint, including, *inter alia*, whether or not a claimant is a member of a joint venture and their relationship to the place searched and/or the property

seized. This analysis is consistent with prior precedent of this Court.

The ruling of the Ninth Circuit Court of Appeals in this case demonstrates that there is no *per se* standing rule based solely on mere membership in a conspiracy or a joint venture. Three of the Respondents herein were found by the Ninth Circuit <u>not</u> to have standing on the record presented in spite of their membership in a joint venture.

Respondent Xavier Padilla does not seek to vicariously assert the rights of Luis Arciniega. Xavier Padilla had a possessory interest in the car and its contents which were seized in the illegal stop. The district court found that the stop was not based on reasonable suspicion. That finding was not challenged on appeal. Further, Xavier

Padilla had a reasonable expectation of privacy in the automobile and its contents under the facts of this case.

A citizen's standing to raise a claim of illegal search or seizure is not dependant upon mere physical presence at the time of the search or seizure or actual possession of the property at the time it is seized. Prior precedent of this Court recognizes that an individual may have standing to challenge a search and/or seizure even though the property was not in their possession and they were not present at the time of the search and/or seizure. Actual possession and physical presence, like membership in a joint venture, are merely factors to be considered. No single factor is dispositive in either direction in a standing analysis.

ARGUMENT

I. Introduction

Contrary to the government's claim, the issue presented is not whether Respondents Xavier Padilla, Maria Simpson, and Donald Simpson have a Fourth Amendment right to object to the unlawful stop of coconspirator Luis Arciniega.[4] Respondents are not attempting to vicariously assert Arciniega's personal Fourth Amendment rights. Nor, contrary to Petitioner's assertions, did the court of appeals base its decision on Respondents' mere status as coconspirators with Arciniega.[5] In fact, that court's opinion in this case demonstrates that the court analyzed the privacy interests of each Respondent separately, granting relief to three,

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[4]Petitioner's brief at (I).

[5]*Id.* at 10, 19.

remanding for additional evidence as to two, and reversing the suppression order as to one. If, as Petitioner states, the Ninth Circuit rule is that mere membership in a joint venture alone confers standing, the court of appeals would have given Jorge Padilla, Maria Padilla and Warren Strubbe standing.

The question that is actually before this Court is whether Xavier Padilla - as custodian and manager of a vehicle used for a commercial purpose - and the Simpsons - as owners of that vehicle - have the right to object to the illegal seizure and search of that vehicle.

The undisputed evidence established that Xavier Padilla, per an agreement with the Simpsons, used the car as a container and conveyance to transport contraband. By secreting the contraband in wrapped packages in the locked trunk,

travelling "virtually along with" the vehicle[6], and being constantly available to handle any problems that might arise during the trip[7], Xavier Padilla established far greater property and privacy rights in the car and its contents than an individual who simply closes a box and sends it through the mail. In *United States v. Jacobsen*, 466 U.S. 109, 114 (1984), the defendant sent a cardboard box by a private courier service. This Court held that Jacobsen had the right to object to the subsequent seizure and search of the package by police officers. The fact that Jacobsen was not present at the time of the

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[6]960 F.2d at 860; 5/8/90 Tr. 69-73, 106-111.

[7]5/8/90 Tr. 70-73. In fact, after Arciniega was arrested and agreed to cooperate, he called Mr. Padilla who, like Arciniega, had travelled to Tempe, Arizona. SER 12-13, 70-71.

seizure and search did not deprive him of standing.

II. Certiorari was improvidently granted

A. Certiorari should be reconsidered in light of this Court's recent pronouncement in *Soldal v. Cook County*.

In the district court, the appellate court, and in the briefs questioning the granting of certiorari by this Court, the parties focused only on the issue of whether Respondents had a reasonable expectation of privacy in the vehicle that was seized and searched. The district and appellate courts analyzed and decided the case in the same fashion.[1]

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[1]Petitioner's brief, at 19, recognizes that the appellate court did not decide whether the search of the car was lawful.

Only days before the government's brief was filed, this Court issued its decision in *Soldal v. Cook County*, 113 U.S. 538 (1992), reiterating that the Fourth Amendment prohibits not only unreasonable searches, but also unreasonable seizures. The Court also reminded judges and litigators that searches and seizures are subject to distinct tests to determine their legality. The legality of a search is subject to attack if a reasonable expectation of privacy is violated; a seizure may be challenged when a government official meaningfully interferes with an individual's possessory interest in property. In any given case, a person may have a privacy interest, but not a possessory interest, or vice-versa. For example, *Soldal* quoted *United States v. Place*, 462 U.S.

696, 708 (1983), stating that "although we found that subjecting luggage to a 'dog sniff' did not constitute a search for Fourth Amendment purposes because it did not compromise any privacy interest, taking custody of Place's suitcase was deemed an unlawful seizure for it unreasonably infringed 'the suspects possessory interest in his luggage.'" *See also Walter v. United States*, 447 U.S. 649, 654 (1980).

The question of whether Respondents' proprietary and possessory interests were violated by the seizure of the car and its contents was never addressed or decided in the district or appellate courts. Petitioner is therefore asking this Court to decide issues that were not litigated or decided below. Under these circumstances, this matter must be summarily remanded to the district court

for further proceedings in light of the decision in *Soldal*. *Riggins v. Nevada*, ___ U.S. ___, 112 S.Ct. 1810, 1814 (1992); *Taylor v. Freeland & Kronz*, ___ U.S. ___, 112 S.Ct. 1644, 1649 (1992); *Berkemer v. McCarty*, 468 U.S. 420, 443, n. 38 (1984).

B. Prior decisions of the court of appeals are consistent with this Court's decisions.

The Ninth Circuit Court of Appeals has used the term "joint venture" in analyzing expectation of privacy issues. In using this term, the court has done nothing more than recognize that legitimate privacy interests can arise when: 1) a property owner allows others to use or control the property;[9] or 2) pursuant to a business agreement, two or

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[9]As in *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984).

more people share responsibility for particular property.[10] Both propositions are entirely consistent with this Court's decisions. As to the first, *see, e.g., Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990); *United States v. Jeffers*, 342 U.S. 48, 50 (1951); as to the second, *see, e.g., Mancusi v. DeForte*, 392 U.S. 364, 368-369 (1968). The court of appeals has done nothing more than follow this Court's edict that the Fourth Amendment not be controlled by "'arcane' concepts of property law . . ." *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980), *quoting Rakas v. Illinois*, 439 U.S. 128, 143 (1978).

The court of appeals has never ruled that mere membership in a conspiracy supports a Fourth Amendment interest in

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[10]As in *United States v. Johns*, 851 F.2d 1131, 1136 (9th Cir. 1988).

the property of a coconspirator. It has ruled that such an interest may arise in a given case based on an agreement with a coconspirator that gives the challenging party control over the place searched or property seized. In so ruling, the court has done nothing more than consider the totality of the evidence - as opposed to "'arcane' concepts of property law" - as required by Supreme Court precedent. *Id.; Oliver v. United States*, 466 U.S. 170, 177-178 (1984). It must be remembered that a conspiracy is nothing more than an agreement between individuals to commit a crime. *Pinkerton v. United States*, 328 U.S. 640, 644 (1946). Criminal conspiracies - like legitimate business deals - often include agreements that grant participants the control or use of property that they do

not own. *See Mancusi v. DeForte*, 392 U.S. at 368-369.

Petitioner also relies heavily on another similar misconception. Petitioner contends that Xavier Padilla cannot assert a constitutional objection to the illegal seizure and search because he was not physically present at that time. If this case had arisen from the seizure and search of Arciniega, without an accompanying seizure and search of the car and the packages in the trunk, Petitioner would be correct. Respondents' expectation of privacy in the car, the trunk, and the packages permits them to challenge the unlawful intrusion. This Court has never held that a person with a reasonable expectation of privacy in a place must be on the scene in order to be able to assert a Fourth Amendment challenge to an

illegal search. *See, e.g., United States v. Jacobsen*, 466 U.S. at 114; *United States v. Alderman*, 394 U.S. 165, 176 (1969); *United States v. Jeffers*, 342 U.S. at 50. In fact, an individual may be present at the scene of the search, but still lack a reasonable expectation of privacy and therefore be precluded from raising a Fourth Amendment challenge. *Rawlings v. Kentucky*, 448 U.S. at 105; *Rakas v. Illinois*, 439 U.S. at 148.

Petitioner's misinterpretation of Ninth Circuit precedent is best seen by reviewing the hypothetical at page 18, n. 6, of the government's brief. There, Petitioner claims to apply "the Ninth Circuit's coconspirator doctrine . . .." Under that "doctrine", Petitioner alleges that the illegal seizure of A's address book from A, would permit coconspirator B

to object to lawful searches of property belonging to B or to others, if those searches were based on information found in A's address book. If the court of appeals made such a ruling, it would indeed violate this Court's decisions. Under precedents issued by both this Court and the court of appeals, B would have a right to object to the search and seizure of A's address book only if B either: 1) had a legitimate expectation of privacy in the place searched; or 2) B had a possessory or proprietary interest in the book itself, such as joint ownership, control or use of the book.[11]

Petitioner relies on two decisions from this Court, neither of which supports the government's position.

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[11]Xavier Padilla would have the right to object under both scenarios.

Petitioner's brief at 15-16. In *United States v. Alderman*, 394 U.S. at 172, the Court held that coconspirators do not have a right to object to a search or seizure of a confederate simply by their status as coconspirators. The court of appeals did not rule to the contrary in this case or any other.

Petitioner also attempts reliance - unsuccessfully - on the decision in *Brown v. United States*, 411 U.S. 223 (1973). There, two thieves attempted to object to the search of a coconspirator's store and the seizure of property the thieves had previously stolen. *Id.* at 224-226. This Court held that Brown was properly denied the right to object to the search of the store and the seizure of the property because: 1) he alleged no proprietary or possessory interest in the store; 2) he was not present at the time of the search

and seizure; and 3) he had sold the stolen property to the store owner two months before the search[12]. *Id.* at 229. The present case is far different. Here, Mr. Padilla maintained a proprietary interest in the car and its contents at the time of the seizure and search.

The Ninth Circuit Court of Appeals has consistently followed the mandates of this Court in applying the Fourth Amendment.[13] While some of the lower

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[12]The Ninth Circuit has consistently held that defendants lose their right to object to searches or seizures of property after they sell or otherwise dispose of the property. *United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir. 1984); *United States v. Culbert*, 595 F.2d 481, 482 (9th Cir. 1979); *United States v. Turner*, 528 F.2d 143, 164 (9th Cir.), *cert. denied*, 96 S.Ct. 426; *United States v. Toliver*, 433 F.2d 867, 869 (9th Cir. 1970).

[13]Petitioner's claim, at 17, that the Ninth Circuit has rendered decisions inconsistent with those of other circuits is similarly incorrect. *See* Opposition to Petition for Certiorari at 14-36.

court's decisions may contain overly broad dictum by reference to "joint ventures" or "coconspirators", the court's conclusions based on the record before it have been correct. By its decision in the present case[14], the court demonstrated that it considers the privacy and possessory interests of each individual and does not base Fourth Amendment interests on mere membership in a conspiracy.

III. <u>The seizure of the car and its contents violated Xavier Padilla's Fourth Amendment rights</u>.

Traditionally, an individual has a cognizable Fourth Amendment interest if

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[14]The court held that only three of the conspirators had standing, while ruling that the record failed to demonstrate that the others had a cognizable Fourth Amendment interest in the car or its contents. 960 F.2d at 863-864.

he has an interest in the property seized or the place searched. In *Soldal* this Court found that a possessory interest in the property seized could confer standing even in the absence of a reasonable expectation of privacy. A reasonable expectation of privacy is an integral element of a standing analysis for either a search or a seizure. In the case at bar Xavier Padilla had both a possessory interest and a reasonable expectation of privacy in the property seized.

A. Possessory interest

Three elemental and irrefutable facts establish that the seizure of the car and its contents violated Xavier Padilla's constitutional rights. First, by stopping the car, the arresting officer seized the car and its contents for purposes of the Fourth Amendment. *See, e.g., Delaware v. Prouse*, 440 U.S.

648, 653 (1979). Secondly, as Petitioner concedes[15], the seizure was made without reasonable suspicion of criminal activity and therefore violated the Fourth Amendment. Finally, Xavier Padilla was given control of the car and its contents by their owners for their mutual business purpose, he hired the driver, and personally oversaw the transporting of the cargo.. The car was nothing more or less than a container being used to transport merchandise.

This Court has consistently and correctly held that people who send packages through the mail or by private delivery service retain a cognizable Fourth Amendment expectation that the packages will not be seized by government agents unless the agents have probable

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[15]Petitioner's brief at 4 & n. 1, 12.

cause or, at the very least, a reasonable suspicion of criminal activity. *United States v. Jacobsen*, 466 U.S. at 114; *Ex parte Jackson*, 96 U.S. 727, 733 (1878). The courts of appeals have unanimously followed this Court's holdings.[16]

The rule urged by the Petitioner would overrule all container cases which confer standing when an individual is not physically present. Courts have consistently recognized that an

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[16]*United States v. LaFrance*, 879 F.2d 1 (1st Cir. 1989); *United States v. Villarreal*, 963 F.2d 770 (5th Cir. 1992); *United States v. Lewis*, 902 F.2d 1176 (5th Cir. 1990); *United States v. Mayomi*, 873 F.2d 1049 (7th Cir. 1989); *United States v. Decker*, 956 F.2d 773 (8th Cir. 1992); *United States v. Longbehn*, 898 F.2d 635 (8th Cir.), *cert. denied*, 111 S.Ct. 208 (1990); *Garmon v. Foust*, 741 F.2d 1069 (8th Cir. 1984); *United States v. Aldaz*, 921 F.2d 227 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 2802 (1991); *United States v. Dass*, 849 F.2d 414 (9th Cir. 1988); *United States v. Hillison*, 733 F.2d 692 (9th Cir. 1984); *United States v. Lux*, 905 F.2d 1379 (10th Cir. 1990).

individual may maintain a cognizable Fourth Amendment interest in a container, place, and/or other property without necessarily being physically present. Yet in the case at bar the Petitioner urges that Xavier Padilla has no reasonable expectation of privacy or interest in the goods seized because he was not physically present at the time his container (the car) and its contents (the contraband) were illegally seized and searched.

Petitioner attempts to hurdle the abyss between its position and this Court's Fourth Amendment decisions by claiming that Respondents' constitutional rights were not violated because the illegal seizure did not delay the return

of the car or its cargo to them.[17] Petitioner's brief at 22-23. The implications of this argument are frightening. In essence, Petitioner asks this Court to issue two rulings which are unprecedented and which would remove the heart and soul of the Fourth Amendment. First, Petitioner asks the Court to permit random, baseless seizures of personalty by government agents. No opinion from this Court has ever intimated that it would so much as consider allowing seizures in the absence of even a reasonable suspicion of criminal conduct. In *United States v.*

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[17]Again, this argument was not made in the district or appellate courts. Further, Petitioner is incorrect; the record establishes that the arrival of the car was delayed. SER 70-71. Regardless, the length of the delay is insignificant; the fact that the seizure was made without even a reasonable suspicion of criminal activity establishes the constitutional violation.

Place, 462 U.S. at 706, the Court declared:

> Given the fact that seizures of property can vary in intrusiveness, some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime.

(footnote omitted). *See also Delaware v. Prouse*, 440 U.S. at 655, *quoting United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)(even a "minimal intrusion" must be supported by reasonable suspicion of criminal activity). The fact that temporarily holding a traveler's luggage or surreptitiously copying an individual's personal papers may not actually interfere with the owners' use of their property does not exempt such governmental intrusions from the dictates

of the Fourth Amendment. This Court has repeatedly held that warrantless searches and seizures are presumptively unreasonable. *See, e.g., United States v. Karo*, 468 U.S. 705, 717 (1984). The Court must not now approve arbitrary intrusions based on nothing more than the whim of an investigating officer on the grounds of a lack of standing.

Secondly, Petitioner seeks to deprive Respondents of the right to object to the seizure of the car and its contents by analogizing the facts of this case to a case in which an owner or custodian loans property to a third party for that party's sole and exclusive use. This claim must fail for two reasons. First, while this Court may someday be presented with a case in which the facts justify such a ruling, under existing precedent, an owner maintains the right

to object to a seizure of property even when the property is in the hands of another:

> The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or, as here, from the immediate custody and control of the owner.

United States v. Place, 462 U.S. at 705. This distinction is appropriate and practical in cases in which the offending law enforcement official makes the intrusion while lacking even a reasonable suspicion that evidence of a crime will be found. A groundless search will be brief; a seizure may deprive the owner or custodian of the property indefinitely. In the case of personalty, the owner or custodian may not even be told where the property is being taken. *Id.* at 710.

More importantly, the case at bar does not present the issue of whether an owner abandons the right to object to the seizure of personal property when the owner loans the property to another for the borrower's exclusive use. The record in the present case establishes that the owners of the car entered into a business agreement with Xavier Padilla by which they authorized him to use the car to transport the contraband for which he was responsible. Xavier Padilla did not loan the car to Arciniega; he hired Arciniega, gave him specific instructions as to his method and route of travel, provided him with a telephone number to call in case problems arose, and travelled "virtually along with" the car during its two hundred twenty mile trip from Douglas to Tempe, Arizona. *United States v.*

Padilla, 960 F.2d at 860; 5/8/90 Tr. 69-73, 106-111.

None of the decisions cited by Petitioner, at 23-24, support its claim. Those decisions correctly hold that when an owner gives property to another for that individual's use, proof of complete and voluntary consent to search by the third party is binding on the owner. These cases assume a valid initial seizure of the property. The present case involves an invalid seizure of an automobile[11]. The question of whether

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[11]Further, this is not a situation of one individual who sells drugs to another and subsequently attempts to challenge the seizure of those drugs from the purchaser long after the seller's interests have been extinguished by the sale. This is a situation of multiple parties maintaining an interest in and to property which is the specific subject of the seizure. If "A" sells drugs to "B" and completes that transaction, "A" has no standing to challenge a subsequent search of "B's" car which results in the seizure of these same drugs which are

the subsequent search violated Respondents' Fourth Amendment rights was not decided below and is not before this Court[19].

Petitioner next claims that Respondents' possessory interest in the cargo does not support their ability to challenge this seizure because the subsequent search of the car revealed the cargo to be contraband. In effect, Petitioner claims that Respondents cannot object to the seizure of the container

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sought to be used against "A" in a conspiracy prosecution. However, if "A" hires "B" to transport drugs from one location to another, "B" drives the car, "A" supervises that enterprise, then both "A" and "B" retain a Fourth Amendment interest as to the seizure of that property. That is the case at bar.

[19]As conceded elsewhere by Petitioner. *See* Petitioner's brief at 19. *See also* footnote 3, *supra*.

because a later search revealed that it contained illegal goods.[20] This position is, of course, contrary to every decision in which this Court has been called upon to address such a contention.

In Wong Son v. United States, 371 U.S. 471, 484 (1963), this Court held that a search is not made valid by what it subsequently discloses. Petitioner urges that a standing analysis should in part depend upon the results of that search. This is a rule that is inconsistent with prior precedent of this Court (albeit in a probable cause

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[20]Petitioner's brief, at 25, n. 9, cites a string of cases in which the courts held that, following the lawful seizure and search of a package containing contraband, law officers could properly insert a tracking device in the container. Obviously, those cases have no application here due to the fact that the initial seizure of the "container" was illegal.

analysis context) and contrary to the purposes of the Fourth Amendment.

Obviously, the exclusionary rule serves to restrain overzealous and malevolent police officers only if they cannot use the fruits of their illegal searches in America's courts. Should this Court hold to the contrary, the exclusionary rule would cease to deter law enforcement officials from the arbitrary seizures and searches that the Fourth Amendment was designed to prohibit.

B. Reasonable expectation of privacy

According to the testimony of drug enforcement agent Plover, Xavier Padilla was actively involved in the actual transportation and was "ultimately responsible" for seeing that the car and its cargo safely proceeded from Douglas

to Phoenix, Arizona, and on to California. 960 F.2d at 860. Great care was taken to ensure that the contraband would not be seized. The drugs were first wrapped in white paper. These packages were labeled "pollo", the Spanish word for chicken. The packages were placed in the locked trunk of an automobile. The automobile was registered to and owned by a United States Customs agent, Respondent Donald Simpson. The car was driven into the United States by his wife, Respondent Maria Simpson. Mr. Simpson's ownership decreased the chances that the car would be searched at the border or stopped thereafter due to the fact that law officers are unlikely to interfere with the travels of a fellow officer.

Xavier Padilla went from Douglas to the Phoenix area on the day that the car

and contraband were making the same trip so that he would be available if problems or questions arose while the car was in transit. He kept in telephonic contact with a confederate in Douglas while the car was in route. Once the car arrived, following the seizure and the driver's agreement to become an informant, the driver - pursuant to orders from Xavier Padilla - called Mr. Padilla for instructions. Xavier Padilla sent his wife and brother to pick up the car.

Based on this uncontradicted evidence, the district court and court of appeals concluded that Xavier Padilla had a reasonable expectation of privacy in the car, the packages, and the contraband so as to permit him to object to the Fourth Amendment violation. The courts' conclusions were clearly correct.

In deciding whether an individual has the right to object to a Fourth Amendment violation courts must consider whether the complainant had a subjective expectation of privacy and whether that expectation is one which society would recognize as reasonable. *Rawlings v. Kentucky*, 448 U.S. at 104-105. A comparison of the evidence in *Rawlings* and the facts of the present case demonstrates the correctness of the lower courts' rulings.

In *Rawlings*, immediately before the police arrived, the defendant dumped illegal drugs into a purse owned by an acquaintance he had met only a few days before. *Id.* at 101-102, n. 1. He did so without any preexisting agreement with the purse's owner and took no steps to ensure that others would not have access to the purse. The defendant admitted

that he did not believe the purse would be free from governmental intrusion. *Id.* at 104-105. Under these facts, this Court properly held that Rawlings had neither a subjective nor an objective expectation of privacy that would permit him to challenge the search of the purse. *Id.* at 105-106.

In the present case, Xavier Padilla took careful measures to ensure that the contraband would not be found. It was wrapped in white paper that was marked so that it appeared to contain chicken. The packages were placed in the locked trunk of a vehicle registered to a law enforcement official. Mr. Padilla hired and instructed the driver, travelled to the destination of the cargo and maintained contact with a confederate located at the starting point of the journey. There can be little doubt that

Mr. Padilla maintained a subjective expectation of privacy.

Clearly, this is an expectation of privacy that society must recognize as objectively reasonable. In today's mobile society, people travel by car regularly for business and personal reasons. When driving on interstate highways, we do not forfeit our Fourth Amendment rights. Without question, the most reasonable place to store property we wish to keep safe and private is the trunk of the car. The privacy interest one retains when hiring a private messenger to drive to a specified location to deliver goods in a locked trunk can be no less than the privacy interest one retains when sending a package through the mail. *See United States v. Ross*, 456 U.S. 798, 823 (1982).

If Petitioner's arguments are to be accepted, the Court must overrule every decision that it has issued governing the seizure of containers in transit. For Petitioner to prevail, the Court must accept seizures based on the whim of government agents; the Court must permit such seizures any time that the owner is not guarding the property. Simply put, a reasonable expectation of privacy does not depend on physical presence.

Finally, Petitioner claims, at 18-19, that the court of appeals ruling in this case will lead to the wholesale suppression of evidence and serve to convict minor defendants while permitting the worst offenders to go free. First, it must be remembered that evidence will be suppressed only in the rare cases in which a Fourth Amendment violation is established. More importantly, the court

of appeals has consistently followed this Court's rulings by focusing on the existence of privacy and possessory interests; in some cases, these interests may belong to a mere courier, while in others they will belong solely to a supervisor. The fact that individuals with greater control and ownership of the tools and fruits of crime may be able to challenge searches when less culpable defendants may not, arises from the same facts which subject major violators to punishment that is far more severe.

If, as Petitioner suggests, this case should be reversed, government agents will be free to seize property and conduct searches so long as the property owner is not present to object. The Constitution must not be rewritten to require us to keep all of our belongings around us to ensure that they will not be

the subject of arbitrary seizures by government officials.

CONCLUSION

In *Rakas*, *Rawlings*, and *Salvucci*[21], this Court moved away from rigid adherence to outmoded property law concepts in determining the right to object to searches and seizures under the Fourth Amendment. Automatic standing rules were abolished. Instead, the Court required a realistic analysis of all the evidence to determine whether a person has an interest in property that is seized or places that are searched. No longer does the Fourth Amendment turn on whether an individual is charged with a possessory offense or is merely present when a search or seizure occurs.

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[21]*United States v. Salvucci*, 448 U.S. 83, 91-92 (1980).

In this case, Petitioner urges a return to those arcane concepts which brought with them the arbitrary and capricious application of the Fourth Amendment.

The court of appeals properly applied the rules set down by this Court. That court did not apply any automatic, *per se* rule as suggested by Petitioner. It simply analyzed the totality of facts available including membership in a joint venture.

The best evidence that the Ninth Circuit does not automatically grant coconspirators standing to raise Fourth Amendment objections on that ground alone is the case at issue here. The court specifically found that Respondents Warren Strubbe, Jorge Padilla and Maria Padilla do not have the right to raise such objections on this record. If

indeed there was an automatic rule of "joint venture standing", these Respondents would have been successful on direct appeal.

Petitioner also urges this Court to adopt a rule that would require constitutional protections to depend upon whether or not an individual has their property virtually in their arms at the time of a search or seizure. Absent such actual possession, Petitioner would place groundless seizures outside of the scope of the Fourth Amendment. Mere physical presence or actual possession is not the foundation on which our right to freedom from governmental harassment must rest.

Finally, the government urges that an individual does not have standing to challenge the seizure and/or search of a container if that container has

contraband in it. A search or seizure has never been made valid by what it subsequently discloses. The rule sought by Petition would render the Fourth Amendment and the exclusionary rule a nullity. The only time the exclusionary rule is applicable is in the case of a motion to suppress. A motion to suppress is filed only if an item of evidentiary value is found as a result of a search and/or seizure. By this argument Petitioner seeks to do indirectly what it cannot do directly -- render the protections of the Fourth Amendment meaningless because no one could ever raise them or assert them due to a lack of standing.

The decision of the Ninth Circuit Court of Appeals must be affirmed.

Respectfully submitted.[22]

Walter B. Nash III

Richard B. Jones

Natman Schaye

No. 92-207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

XAVIER V. PADILLA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS DONALD SIMPSON AND MARIA SIMPSON

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(By Appointment of This Court)

February 8, 1993

QUESTIONS PRESENTED

1. Whether the owners of an automobile seized in their absence can contest the legality of that seizure.

2. Whether respondents had a possessory interest in the contraband contained in their car when the car and its contents were illegally seized, entitling them to contest the seizure of the contraband as well as the car.

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Petitioner,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS DONALD SIMPSON AND MARIA SIMPSON

STATEMENT

On September 26, 1989, Officer Fifer of the Arizona Department of Public Safety stopped a car driven by Luis Arciniega and jointly owned by Respondents Donald and Maria Simpson. Officer Fifer acted without probable cause or even a reasonable suspicion: he had radioed the car's

license plate number to a police dispatcher and, because of some error, he purported to act under the mistaken impression that the car was not carrying the proper license plates. T.R. 5/15/90 at 92, 99-100 (radio conversation with Officer Williamson); see also *id.* at 74 (same, with police dispatcher); Exhibit 9, T.R. 5/15/90 at 83 (police report). Nonetheless, after this mistake came to light, Officer Williamson (who had joined Officer Fifer) seized the car keys from the ignition without permission, opened the locked trunk of the car, and discovered cocaine. T.R. 5/15/90 at 96, 118. A grand jury indicted both of the Simpsons for possessing that cocaine with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1).[1]

1. *The District Court's Decision.* In the United States District Court for the District of Nevada, the Simpsons moved to suppress evidence flowing from the stop of their car or its subsequent search. The district court found that Officer Fifer had no reason to stop the Simpsons' car. It rejected the contention that Officer Fifer had been motivated by the license plate confusion because his testimony in that regard was not credible. Pet. App. 25a-27a. It also rejected the contention that the car's slow speed had been the motivation. *Id.* at 25a, 27a-28a; see also T.R. 5/8/90 at 143; T.R. 5/15/90 at 87. It therefore ruled that the stop was an unconstitutional seizure.

The district court also ruled that the Simpsons had the right to object to the seizure of their vehicle as violating their Fourth Amendment rights. Pet. App. 22a-23a. It ruled that the Simpsons could contest the stop because "the two Simpsons owned the car" and, by briefly loaning it to Arciniega, "they had not given up their interest in the car."

[1] The grand jury also indicted the Simpsons for conspiring to distribute cocaine and conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. § 846.

Id. at 23a. The district court also held that the Simpsons "intended to have control over" the cocaine in the car's locked trunk, and they had gained that control by reason of their participation in "a joint venture for transportation . . . that had control of the contraband." *Id.* at 22a-23a.

After finding both that the stop of the car was unreasonable and that it violated the Simpsons' own property and possessory interests, the district court ordered the fruits of the illegal stop suppressed. *Id.* at 30a. The court also denied the government's subsequent motion for rehearing, which argued that the evidence of the cocaine and a subsequent investigation that resulted from finding that cocaine was attenuated from the unconstitutional stop. "Had there not been a stop," ruled the court, "it is clear to the Court that none of this investigation would have transpired." *Id.* at 34a.

Because it held that all incriminating evidence had flowed from the illegal stop, the district court did not rule on the Simpsons' contention that the subsequent search of their locked trunk was also unconstitutional. Regarding the constitutionality of the search, the district court held that "we just don't get to that issue in this case." *Id.* at 29a; see also T.R. 5/15/90 at 126 (noting that the search was not in issue if "he shouldn't have made the stop").

2. *The Court of Appeals' Affirmance.* In the United States Court of Appeals for the Ninth Circuit, the United States conceded that Officer Fifer had stopped the Simpsons' car without reason and had therefore acted unconstitutionally. Pet. App. 7a. It appealed the district court's determination that the Simpsons' own rights had been violated by that seizure.

In order to determine whether the Simpsons "had an ownership interest in seized . . . property," *id.* at 11a (quoting *United States* v. *Taketa*, 923 F.2d 665, 671 (9th Cir.

1991)), the court of appeals engaged in "fact-specific analysis" that included "the respective possessory interests asserted," Pet. App. 10a (same). In this regard, the court noted that each of the Simpsons "exercise[d] independent ownership of the vehicle." *Id.* at 12a n.3; see also *id.* at 7a ("only the Simpsons owned the vehicle"). Moreover, although "the defendants here did not *own* the contraband," the Simpsons "held a possessory interest in the same sense that the proprietors of a delivery service would possess a package." *Id.* at 11a (emphasis in original). The court also found that each of the Simpsons' own participation in the joint venture to transport cocaine "demonstrated [their] joint control and supervision over the drugs" at the time of their seizure. *Id.* at 14a; see also *id.* at 12a-13a & n.3. "Accordingly, the Simpsons . . . had standing not simply because the Simpsons owned the car and jointly possessed the drugs . . . but also because they participated in the organization, particularly on the day of the stop." *Id.* at 12a.

The court of appeals went on to distinguish the Simpsons' interests, which had been implicated by Officer Fifer's unconstitutional car stop, from the interests claimed by other of their alleged co-conspirators. Thus, the court of appeals reversed the district court with respect to Jorge and Maria Padilla because they did not own the car and "did not control the drugs." *Id.* at 14a.[2] Similarly, the court of appeals reversed the district court's determination with respect to Warren Strubbe because "his mere involvement in a conspiracy does not, by itself, suffice," *id.* at 15a, "[n]or did he own the vehicle," *id.* at 16a.

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[2] It remanded with respect to them, however, for a determination concerning their responsibility for the arrangement that did control the drugs. Pet. App. 15a.

SUMMARY OF ARGUMENT

There are two independent reasons for affirming the lower courts' judgment that the Simpsons' Fourth Amendment rights were violated by Officer Fifer's illegal stop. First, the Simpsons owned the car that Officer Fifer stopped, and for that reason alone they have the right to complain that the car stop was an unreasonable seizure of their "effects." Second, the Simpsons possessed the contraband inside the car, and the illegal stop of the car also constituted an illegal seizure of the contraband contained within. Because the Simpsons may therefore challenge the stop as an illegal seizure of their property, the question presented by the Petition -- which concerns privacy interests relevant only to searches -- has no bearing with respect to the Simpsons.

1. It is settled that a defendant has the right to challenge police conduct that "has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). Where, as here, the conduct at issue is an unreasonable seizure of property, the defendant must show that a property or possessory interest has been affected; neither privacy nor liberty interests are relevant. *Soldal* v. *Cook County*, 113 S. Ct. 538, 543 (1992). Consequently, "one derives standing to object to a seizure of his property solely from the property interest." 4 Wayne R. LaFave, *Search and Seizure* § 11.3(e), at 337 (2d ed. 1987).

Because of their broad property interests, owners of property always have the right to challenge its seizure. Such a seizure infringes one or both of their interests in the property: the right to exclude the government from their property and the right to use their property in whatever way they choose.

Officer Fifer's stop of the car abridged the Simpsons' ownership interests and therefore constituted a seizure of the Simpsons' car. The Simpsons were ousted of their dominion over the car upon Officer Fifer "physical[ly] taking [it] into custody." *California* v. *Hodari D.*, 111 S. Ct. 1547, 1550 (1991) (quoting *Pelham* v. *Rose*, 76 U.S. [9 Wall.] 103, 106 (1870)). Thus, even had Officer Fifer limited himself to a temporary investigative stop, it is well-settled that such stops are Fourth Amendment seizures. He exceeded the scope of a mere investigative seizure, however, and it is thus especially clear that his intrusion was a meaningful interference with the Simpsons' property interests and constituted a seizure.

Because owners of property always have the right to challenge its seizure, and because the stop here constituted such a seizure, that should be the end of the inquiry. But the government incorrectly contends that the Simpsons lost their right as owners to contest the seizure of their car because they were not physically present when it was seized. The Court has recognized, however, that "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects . . . may be made after the owner has relinquished control of the property to a third party." *United States* v. *Place*, 462 U.S. 696, 705 (1983). To now hold otherwise would revive the discredited theory that the Fourth Amendment protects only privacy or liberty, which the Court laid to rest earlier this Term in *Soldal*.

2. The Simpsons have a second possessory interest that was invaded by the stop of their car. In a fact-finding hearing held by the district court, they "establish[ed] the requisite standing by claiming 'possession'" of the contraband locked in their trunk at the time of the stop, as the government accuses them. *Brown* v. *United States*, 411 U.S. 223, 228 (1973). Officer Fifer invaded this possessory

interest because, when his stop asserted dominion and control over the car, it also constituted the "assertion of dominion and control over . . . its contents [that] did constitute a 'seizure.'" *United States* v. *Jacobsen*, 466 U.S. 109, 120 (1984). The invasion of this second possessory interest provides a second basis for the Simpsons' right to challenge the stop.

3. These two bases for the Simpsons' assertion of a Fourth Amendment violation rest solely on property and possessory interests. In its Petition for certiorari, however, the government asked this Court to review only privacy issues. For that reason, the Court may wish to dismiss the writ of certiorari as improvidently granted with respect to the Simpsons.

ARGUMENT

The court of appeals correctly determined that the Simpsons had the right to challenge the illegal stop of their car and its contents, because that stop violated their own Fourth Amendment interests. Although the court assessed the Simpsons' interests by looking to a confluence of factors, we demonstrate below that each factor alone suffices to support the finding that Officer Fifer's illegal stop violated the Simpsons' own property and possessory interests, which are protected by the Fourth Amendment's injunction against unreasonable "seizures" of "effects."

I. THE SIMPSONS MAY CONTEST THE SEIZURE OF THEIR AUTOMOBILE

The Simpsons are the only defendants who hold property interests in the car that Officer Fifer illegally stopped. In holding that the Simpsons' rights were invaded by that illegal police action, both courts below relied in part

on the fact that "the Simpsons owned the car." Pet. App. 12a & n.3; see also *id.* at 23a. We now show that, by itself, this basis is sufficient to affirm the court of appeals' determination with regard to the Simpsons, without the necessity of inquiring into any aspects of the alleged conspiracy.

A. Owners Have The Right To Challenge The Seizure Of Their Property

A defendant has the right to bring a Fourth Amendment challenge when disputed state action "has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). This Court has also instructed that "the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures." *Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Horton* v. *California*, 496 U.S. 128, 133 (1990) (citation omitted).[3] In the context of seizures, therefore, no role is played by the reasonable expectation of privacy that is germane to Fourth Amendment challenges to searches. Rather, "one derives standing to object to a seizure of his property solely from the property interest." 4 Wayne R. LaFave, *Search and Seizure* § 11.3(e), at 337 (2d ed. 1987). Accord *United States* v. *Salvucci*, 448 U.S. 83, 91 n.6 (1980); *Rakas*, 439 U.S. at 142 n.11; *United States* v. *Lisk*, 522 F.2d

[3] Accord *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Texas* v. *Brown*, 460 U.S. 730, 747 (1983) (Stevens, J., concurring).

228, 230 (7th Cir. 1975) (Stevens, J.); *cf. United States* v. *Hillyard*, 677 F.2d 1336, 1338 & n.1 (9th Cir. 1982) (Kennedy, J.).

Property rights have always been considered a grant to an owner of uninterrupted "dominion over his or her . . . property." *Horton*, 496 U.S. at 133. Blackstone regarded property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries *2. An owner's dominion over his property has been described as having at least two parts: "a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for [the owner's] own purposes." *United States* v. *Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring in part and dissenting in part).

A seizure invades both of these interests. By its intrusion, the government invades "the right to exclude," *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979), which the Court has recognized in its Fourth Amendment jurisprudence as "[o]ne of the main rights attaching to property." *Rakas*, 439 U.S. at 144 n.12; see also *Rawlings* v. *Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring). A seizure also interferes with the owner's right to use his property in whatever way he chooses absent "physical invasion by government." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). As the Court has thus recognized with respect to cargo ships, "the owners have a right to employ the ship in such voyages as they may please." *The Steamboat Orleans* v. *Phoebus*, 36 U.S. [11 Pet.] 175, 183 (1837). That recognition applies equally to cars and personal property in general, because "personal property, wherever it may be, is under the personal control of its owner." *Crapo* v. *Kelly*, 83 U.S. [16 Wall.] 610, 622 (1872). Interfering with this facet of an owner's property

interest also constitutes "the invasion of his indefeasible right of . . . private property." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

Because a seizure invades these aspects of a property interest, an owner always has the right to contest the seizure of his own property, as the Court has repeatedly held. *E.g.*, *Soldal* v. *Cook County*, 113 S. Ct. 538 (1992); *United States* v. *Jacobsen*, 466 U.S. 109, 120, 124-25 (1984); *United States* v. *Place*, 462 U.S. 696 (1983). As the Court recognized in *Rakas*, 439 U.S. at 142 n.11 (1978), defendants have the right to "contest the lawfulness of the seizure . . . if their own property were seized." The government thus concedes (Br. 26 n.10) "the general proposition . . . that a person may challenge the seizure of his own property." So far as we know, this Court has never found an exception to this rule; in any event, the United States cites no decision of the Court that has ever denied an owner's right to challenge government action that constituted the seizure of his own property.

This does not mean that one who owns property necessarily has the additional right to contest the search of either that property or the place where that property is kept. In contrast to a seizure, a search implicates only "an expectation of privacy that society is prepared to consider reasonable," *Jacobsen*, 466 U.S. at 113, and for that reason a party may contest a search "only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party." *United States* v. *Payner*, 447 U.S. 727, 731 (1980). But the police action found illegal by the lower courts -- the unreasonable stop "of the Simpson vehicle being driven by Mr. Arciniega," Pet. App. 29a -- was not a search. As we now show, Officer Fifer's illegal stop constituted a seizure of the Simpsons' car. For that reason, the Simpsons have the right to contest it.

B. The Unreasonable Stop Of The Simpsons' Car Constituted An Illegal Seizure Of Their Car

Under the Court's test, Officer Fifer's illegal stop constituted a seizure of the Simpsons' car. The Court recognized in *California* v. *Hodari D.*, 111 S. Ct. 1547 (1991), that an inanimate object is seized upon a state actor "physical[ly] taking [it] into custody." *Id.* at 1550 (quoting *Pelham* v. *Rose*, 76 U.S. [9 Wall.] 103, 106 (1870)). Officer Fifer's stop was such "an open, visible possession claimed, and authority exercised under a seizure," because of which the Simpsons were "no longer at liberty to exercise any dominion" over their car. *The Josefa Segunda*, 23 U.S. [10 Wheat.] 312, 325 (1825), *cited with approval in Hodari D.*, 111 S. Ct. at 1550. This "assertion of dominion and control . . . did constitute a 'seizure.'" *Jacobsen*, 466 U.S. at 120 & n.18.

The government suggests that the stop seized only Arciniega, but the fact that he, too, was seized does not alter the conclusion that Officer Fifer also seized the car when he stopped it. Indeed, one of the justifications offered for the stop by Officer Fifer was his desire to confirm the suspicion that the car was improperly registered and carrying erroneous license plates. The present situation is thus no different than the stop addressed in *Delaware* v. *Prouse*, 440 U.S. 648, 650 (1979), where the Court found that police had failed to establish any reason "that either the car or any of its occupants [was] subject to seizure."

The United States also contends (Br. 22) that Officer Fifer's illegal action was only a "temporary investigatory stop" that did not "ripen[] . . . into a seizure of the car" until

later events had transpired.[4] This contention is premised on a mistaken view of the law. Although the Court in *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968), relaxed the level of suspicion necessary for temporary investigative seizures, it emphasized that they were seizures nonetheless. Accordingly, even when finding particular temporary stops justified under *Terry*, the Court has always analyzed them as Fourth Amendment seizures. *E.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977); *Adams* v. *Williams*, 407 U.S. 143 (1972). In other cases, the Court has similarly recognized that vehicle stops constitute seizures. *E.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985); *United States* v. *Hensley*, 469 U.S. 221, 226 (1985); *Colorado* v. *Bannister*, 449 U.S. 1, 4 n.3 (1980); *Prouse*, 440 U.S. at 650, 653. Thus, the government concedes (Br. 7) that the illegal stop, even if temporary, was sufficient to constitute a seizure of Arciniega. Because the stop simultaneously affected the Simpsons' property to the same degree, it was also a seizure of their car.[5]

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[4] The government's contention in this regard is a new argument raised for the first time in the Brief of the United States to this Court. The United States did not present this contention at the suppression hearing, despite the fact that it bears the "burden to demonstrate that the seizure . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida* v. *Royer*, 460 U.S. 491, 500 (1983) (plurality opinion). Nor did it press this contention on appeal. Given the lack of any guidance on this fact-bound issue from the lower courts, this Court should refuse to consider this new argument. *Davis* v. *United States*, 495 U.S. 472, 488-89 (1990); *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958).

[5] The government's *Terry* analogy must also be rejected because *Terry* is relevant only to the level of suspicion necessary to justify an investigative seizure. The United States conceded in the court of appeals that Officer Fifer's seizure of the Simpsons' car was unreasonable under the Fourth Amendment. Thus, while the temporary nature of a seizure

(continued...)

The reason this Court has held that such police conduct constitutes a "seizure" within the meaning of the Fourth Amendment is that even the temporary assertion of superior dominion meaningfully interferes with an owner's dominion over his property. The Court recognized this proposition in *Place*, when it treated as a seizure "the intrusion upon the individual's Fourth Amendment rights when the police briefly detain [his] luggage for limited investigative purposes." 462 U.S. at 705. The Court also applied the amendment's protections in *Soldal*, even though the petitioners' mobile home had only been moved to an adjoining lot, and it was subsequently returned to its original position. When the owners challenged the government's action as a seizure of their property, the Court found that the "removal of the Soldals' trailer home implicated their Fourth Amendment rights," 113 S. Ct. at 543, because even temporary interferences with property interests "plainly implicate the interests protected by that provision." *Id.* at 549.[6]

While even a *Terry*-type stop is a seizure that interferes with owners' property interests, in this case "[t]he manner in which the seizure . . . [was] conducted" by Officer Fifer went

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[5](...continued)
may go to the question of whether or not it was reasonable, *Place*, 462 U.S. at 706, the United States does not bring the issue of reasonableness before the Court in this case.

[6] In the analogous context of the Takings Clause, this Court has declared that temporary deprivations give owners the right to bring a constitutional challenge. *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2891-92, 2901 n.17 (1992); *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987). The Fourth Amendment is analogous to the Takings Clause because these provisions "target[] the same sort of governmental conduct." *Soldal*, 113 S. Ct. at 548; see also *Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring) (drawing analogy).

well beyond the limits of such a stop in at least two respects. *Place*, 462 U.S. at 707-08; *Terry*, 392 U.S. at 28; see also *Dunaway* v. *New York*, 442 U.S. 200, 212 (1979).[7] First, the officers on the scene continued their seizure even after they determined that the car's plates were proper, as both courts below specifically found. Pet. App. 4a, 26a; see also T.R. 5/15/90 at 76-77, 111-15, 157. Second, prior to searching the Simpsons' trunk, Officer Williamson seized from the ignition switch the keys to the vehicle, without consent from Arciniega or anyone else to do so. T.R. 5/15/90 at 96, 118. Because the car's keys were seized, the stop of the Simpsons' vehicle is analogous to a seizure of a person that exceeds the narrow scope of *Terry* "as soon as a suspect's freedom of action is curtailed to a 'degree associated with a formal arrest.'" *Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984) (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983)).[8] In sum, Officer Fifer's stop was clearly a meaningful intrusion that seized the Simpsons' car.

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[7] While a traffic stop may fit under *Terry* if it is merely to determine whether a suspicious registration is in order, the government must demonstrate that its assertedly temporary seizure came to an end as soon as that suspicion was laid to rest. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). Accord *United States* v. *Millan-Diaz*, 975 F.2d 720 (10th Cir. 1992); *United States* v. *Walker*, 933 F.2d 812 (10th Cir. 1991); *United States* v. *Tapia*, 912 F.2d 1367 (11th Cir. 1990); *United States* v. *Rivera*, 906 F.2d 319 (7th Cir. 1990); *United States* v. *Daniel*, 725 F. Supp. 532 (M.D. Ga. 1989); see generally 3 Wayne R. LaFave, *Search and Seizure* § 9.2(f), at 382 & n.139 (2d ed. 1987).

[8] Lower courts have thus found that a traffic stop exceeded the bounds of a temporary investigative seizure if, after an officer stopped a car, he also "took the key from the ignition." *United States* v. *McQuagge*, 787 F. Supp. 637, 646 (E.D. Tex. 1991); see also *Millan-Diaz*, 975 F.2d at 721; *United States* v. *Holifield*, 956 F.2d 665, (7th Cir. 1992); *United States* v. *Birdsong*, 446 F.2d 325, 327 (5th Cir. 1971); *United States* v. *Ospina*, 618 F. Supp. 1486 (E.D.N.Y. 1985); *United States* v. *Whitlock*, 418 F. Supp. 138 (E.D. Mich. 1976), *aff'd*, 556 F.2d 583 (6th Cir. 1977).

C. The Seizure Invaded The Simpsons' Fourth Amendment Rights

We have shown above both that owners of property always have the right to challenge the seizure of their property and that Officer Fifer's stop constituted a seizure of the Simpsons' car. That should be sufficient to end the inquiry with regard to the Simpsons. The government contends, however, that the Simpsons lost their right as owners to contest the seizure of their car because they were not physically present when it was seized.

That contention is incorrect. It is well settled that an absent owner can challenge a seizure of his property, even while it is on loan to another, because "[t]he intrusion on possessory interests occasioned by a seizure of one's personal effects . . . may be made after the owner has relinquished control of the property to a third party." *Place*, 462 U.S. at 705; see also *Lisk*, 522 F.2d at 230. Thus, in *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), the Court heard a challenge by an arrestee to the seizure of his car from a public parking lot while he was incarcerated. Both the plurality and dissenting justices analyzed the seizure under traditional Fourth Amendment principles, recognizing that the owner's property interests had survived the bailment and were implicated by the government's action. See also *Soldal*, 113 S. Ct. at 545 (explaining *Cardwell*).[9] To hold otherwise

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[9] The Court similarly inquired into the reasonableness of the seizure in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), which the owner challenged after his car was taken from his driveway while he was away and in custody. Unlike Officer Fifer's seizure, the seizures in both *Cardwell* and *Coolidge* were ultimately found reasonable.

would confuse one who loans his property or places it in a safe-deposit box with one who abandons it. *Cf. Abel* v. *United States*, 362 U.S. 217, 240-41 (1960).[10]

This principle -- that one who entrusts his property to another may contest its seizure during the bailment -- is of ancient origins. According to Blackstone, "the bailor hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away." 2 William Blackstone, Commentaries *396. This principle extends equally to seizures that are temporary, which also may be contested by the absent owner. Thus, in *Jacobsen*, a federal agent temporarily seized a package that previously had been placed with a private carrier service. When the customer challenged the temporary seizure out of his presence, the Court recognized that the seizure implicated protected ownership rights and applied Fourth Amendment precepts. 466 U.S. at 120.[11]

The lower federal courts also agree that absent owners have the right to object to the temporary investigative seizure of their property, even if that seizure endured only

[10] As the Court recognized in *Warden* v. *Hayden*, 387 U.S. 294, 301 (1967), the Fourth Amendment continues to shield effects "without regard to the use to which any of these things are applied." In the analogous Takings Clause jurisprudence, the Court has recognized that, even when the owner is absent and has placed his property in a second party's care, he has not abandoned either his property or his right to exclude third parties. *E.g.*, *Loretto* v. *Teleprompter*, 458 U.S. 419, 438-39 (1982) (owner has right to challenge minor physical occupation of property that is being rented).

[11] *Jacobsen* reaffirmed this aspect of *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). In both cases, the postal patrons' ownership interests were ultimately found to have been outweighed by valid grounds for the seizure, which Officer Fifer did not have here.

while the property was out of their physical possession. For example, in *United States* v. *Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976), the Eighth Circuit held that an owner has the right to challenge the temporary seizure of films, which at the time had been shipped from the owner's presence, noting that "[a] contrary conclusion would emasculate the plain language of the Fourth Amendment, which protects 'papers' and 'effects.'" Accord *United States* v. *Haes*, 551 F.2d 767, 769-70 (8th Cir. 1977) (absent owner of films had right to contest their seizure during shipment). Similarly, the Third Circuit has held that "[t]here can be no question of an owner's standing to object to a *seizure* of his property . . ., even when a third party has temporary possession of that property." *United States* v. *House*, 524 F.2d 1035, 1042 (3d Cir. 1975) (emphasis in original). Thus, in a case analytically indistinguishable from the present one, the Third Circuit squarely held that an absent owner of trucks that had been subject to investigative seizures had the right to challenge those seizures. *United States* v. *Shaefer*, 637 F.2d 200 (3d Cir. 1980). In that case, as here, the United States argued that the owner could not contest seizures of his own trucks because he was not present at the time of the investigative seizures, but that contention was rejected because "the Fourth Amendment's prohibition against seizures of property does not depend upon presence of the owner." *Id.* at 203.

The United States does not take issue with the foregoing precedents or analysis, instead placing virtually exclusive reliance (Br. 19 & 21) on the Seventh Circuit's opinion in *United States* v. *Powell*, 929 F.2d 1190, 1195 (7th Cir. 1991), to the effect that the seizure of a car affects only the liberty interests of those who are present. However, even the Seventh Circuit recognized in that case that "ownership carries with it a right to exclude." *Id.* at 1194-95. In declining to apply that principle to the seizure at issue, the Seventh Circuit gave the constitutional protection

against "seizures" of "effects" exactly the cramped reading that the Court overturned earlier this Term in *Soldal*. The Court in that case overturned the Seventh Circuit's theory that seizures only implicate privacy or liberty interests, ruling instead that the Fourth Amendment protects "possessory interests where neither privacy nor liberty [is] at stake." 113 S. Ct. at 543 (reversing *Soldal* v. *Cook County*, 942 F.2d 1073 (7th Cir. 1991) (en banc)).

Nor does *Powell* recognize or address precedents of this Court (such as *Place* and *Jacobsen*) or those of sister courts (such as *Shaefer*) which have found that absent owners have the right to contest even temporary seizures of their property. Because the ownership interest in deploying one's property as he sees fit is separate from a liberty interest in personal freedom of movement, the owners of cars, trucks or freighter ships all have the right to challenge warrantless seizures of their means of conveyance, as the Court has recognized from the earliest days of the Republic. See, *e.g.*, *Gelston* v. *Hoyt*, 16 U.S. [3 Wheat.] 246, 305-06 (1818) (suit by absent owner of ship that was "detained"); *Otis* v. *Watkins*, 13 U.S. [9 Cranch] 339, 353 (1815) (suit by absent owner of seized schooner). For a similar reason, the government is mistaken when it contends (Br. 22) that the seizure of the Simpsons' car is no greater an intrusion of their rights than if Officer Fifer had only delayed its return by seizing Arciniega without illegally seizing the car. Unlike the government's hypothetical, Officer Fifer's seizure was the direct assertion by a state actor of dominion and control over the Simpsons' car, in violation of their Fourth Amendment rights.

Because the Simpsons can challenge the stop of their car, evidence flowing from that stop was rightly excluded from their trial. The district court ruled that the cocaine discovered in the trunk of the Simpsons' car had to be suppressed as fruit of the illegal seizure of the car. Pet.

App. 32a. The United States sought rehearing on the issue of whether the evidence was attenuated from the illegal seizure, *id.* at 31a-34a, and it also appealed this issue to the court of appeals, *id.* at 17a-21a. It has not sought the Court's review of the lower courts' attenuation determinations, however, and for that reason the issue is not before the Court. Accordingly, the court of appeals should be affirmed with respect to the Simpsons.

II. THE SIMPSONS POSSESSED THE CONTRABAND CONTAINED IN THEIR CAR AND THEREFORE MAY CONTEST ITS SEIZURE, WHICH OCCURRED WHEN OFFICER FIFER STOPPED THE CAR AND ITS CONTENTS

There is a second and independent basis for the Simpsons to challenge Officer Fifer's stop and thereby have the evidence flowing from that stop excluded from their trial. Looking to traditional indicia of possession, the court of appeals found that the Simpsons exercised "joint control and supervision over the drugs," Pet. App. 14a, and therefore held a "possessory interest in the drugs" that were locked in their trunk when Officer Fifer, by his stop, asserted dominion and control over both the car and its contents. *Id.* at 11a. As we now show, this aspect of the court of appeals' opinion was correct.

A. The Simpsons Possessed The Contraband Contained In Their Car

It has never been a disputed issue in this case that the Simpsons possessed the cocaine in their trunk when Officer Fifer stopped their car. The government indicted the Simpsons for this possession, and it continues to seek to

predicate criminal liability on precisely this alleged fact.[12] Moreover, in a hearing held pursuant to *Simmons* v. *United States*, 390 U.S. 377 (1968), the Simpsons demonstrated that they possessed the cocaine when it was seized. See generally *Brown* v. *United States*, 411 U.S. 223, 228 (1973) ("the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence").[13] The district court therefore concluded that they "had control of the contraband," Pet. App. 22a, and the court of appeals agreed that the Simpsons "held a possessory interest" in the contraband, *id.* at 11a, by virtue of their "joint control" over it. *Id.* at 14a. While the United States makes other arguments in its Brief, discussed *infra* Section II.C., nowhere does it seek to rebut its recognition (Br. 24) that the Simpsons held a "possessory interest . . . in the cocaine hidden in the trunk."

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[12] The only possession alleged in Count 3 of the indictment was "on or about September 26, 1989, at or near Tucson." C.A. Excerpt of Record Doc. 29, at 3. The Simpsons were not at the place alleged at that time, and in any event the record clearly discloses that only Arciniega had physical control of the contraband in the alleged circumstances. Indeed, the record discloses no instance in which Mr. Simpson ever had physical control of the contraband.

[13] The United States (Br. 26 n.10) erroneously characterizes the analysis we present in text as the "automatic standing rule" of *Jones* v. *United States*, 362 U.S. 257, 261-64 (1960), which was overturned in *Salvucci*. The Simpsons made separate presentations to affirmatively demonstrate their possessory interest at the time of the contested seizure and did not merely rest on the allegations charged in the indictment. It is clear, therefore, that the Simpsons did not take advantage of any rule of "automatic standing." In any event, *Salvucci* concerned searches and not seizures, and the Court in that case was therefore differentiating between the possessory interests alleged by the government's indictment and the privacy interest necessary to assert a Fourth Amendment challenge to a search.

It is for good reason that the government does not contend that the Simpsons are without possessory interests. The district court's finding that the Simpsons "had control of the contraband" and "intended to have control over it," Pet. App. 22a-23a, comports with this Court's recognition that possession may be found when a defendant "had both the ability and the intent to exercise dominion and control." *Ulster County Court* v. *Allen*, 442 U.S. 140, 164 (1979).[14] Similarly, the contraband was concealed in the Simpsons' locked trunk, and "[o]ne who owns a motor vehicle in which contraband is concealed may be deemed to possess the contraband." *United States* v. *Ruiz*, 860 F.2d 615, 619 (5th Cir. 1988) (citing cases); see also *Steagald* v. *United States*, 451 U.S. 204, 209 (1981) (absent defendant's "connection with the searched home was sufficient to establish his constructive possession of the cocaine found in a suitcase in the closet of the house"). The fact that Arciniega was driving the car is of no moment, for possessory interests may be established when the defendant exercises his control and dominion over the item "either directly or through others." *United States* v. *Shackleford*, 738 F.2d 776, 785 (7th Cir. 1984); *United States* v. *Staten*, 581 F.2d 878, 883 (D.C. Cir. 1978); *United States* v. *Craven*, 478 F.2d 1329, 1333 (6th Cir.

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[14] The courts of appeals agree that a defendant may be found to have possessed an item not in his physical control. Whenever the question has arisen in the context of criminal liability for possessing narcotics, the courts have emphasized that, as Judge Posner has put it, "the essential point is that the defendant have the ultimate control over the drugs . . . as the owner of a safe deposit box has legal possession of the contents even though the bank has actual custody." *United States* v. *Manzella*, 791 F.2d 1263, 1266 (7th Cir. 1986); see, *e.g.*, *United States* v. *Ayala*, 887 F.2d 62, 68 (5th Cir. 1989); *United States* v. *Gardea Carrasco*, 830 F.2d 41, 45 (5th Cir. 1987); *United States* v. *Zandi*, 769 F.2d 229, 234-35 (4th Cir. 1985); *United States* v. *Martorano*, 709 F.2d 863, 866-67 (3d Cir. 1983); see generally Wayne R. Lafave and Austin W. Scott, Criminal Law § 3.2(e) (2d ed. 1986); 28 C.J.S. Drugs and Narcotics, Supp. § 158.

1973). The examination undertaken by the court of appeals thus comported with the general test for determining whether the Simpsons themselves had possession of the contraband.

The United States mischaracterizes the decision below as turning on mere participation in a conspiracy. The court of appeals explicitly rejected this very contention, finding that a "'coconspirator exception' . . . would be in clear contravention of holdings of the Supreme Court and this circuit." Pet. App. 16a (citing *Alderman* v. *United States*, 394 U.S. 165, 172 (1969); *United States* v. *Taketa*, 923 F.2d 665, 671 (9th Cir. 1991); *United States* v. *Turner*, 528 F.2d 143, 164 (9th Cir. 1975)). Rather, it followed its own precedent and carefully "engage[d] in fact-specific analysis [of] . . . the respective possessory interests asserted" to determine the question that is relevant to the issue of the Simpsons' right to challenge a seizure -- the nature of the Simpsons' own "ownership interest in [the] seized . . . property." Pet. App. 10a-11a (quoting *Taketa*, 923 F.2d at 671). In this context, the court of appeals found that the Simpsons had proven their own possessory interests and agreed with the government that "mere involvement in a conspiracy does not, by itself, suffice." Pet. App. 15a.

To be sure, the government charged the Simpsons not only with possession but also with conspiracy both to possess and to distribute. For that reason, the court examined the alleged conspiratorial distribution network in order to separate out the Simpsons' own possessory interests from both their mere participation in the alleged conspiracy and the possessory interests of their alleged co-conspirators. To have done any less, the court of appeals would have run afoul of *Brown* v. *United States*, 411 U.S. at 228, and stripped the Simpsons of their right to demonstrate their own

possessory interests in the seized contraband, only because the government also accused them of possessing it as part of a distribution network.[15]

B. The Stop Constituted A Seizure Of The Contraband That Invaded The Simpsons' Possessory Interests

As we have shown, the stop of the Simpsons' car constituted its seizure. It is settled that the seizure of a container, such as a car, also constitutes the seizure of its contents. Thus, in *Jacobsen*, the Court reviewed a challenge to the initial stop of a package and the subsequent destruction of some of its contents. In analyzing its initial stop, the Court recognized that, at its inception, "the agents' assertion of dominion and control over the package and its contents did constitute a 'seizure.'" 466 U.S. at 120. Because the contents had thus been initially seized, the Court found that its subsequent partial destruction "converted what had been only a temporary deprivation of possessory interests into a permanent one." *Id.* at 124-25. Following the same principle, the Court has recognized that a stop of a car constitutes a seizure of its contents, finding that the reasonableness of the car's stop may be judged with exclusive reference to its contents. *E.g.*, *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979).[16] Here, too, when Officer Fifer stopped the car, he also asserted dominion and control over its contents, which from that point on could not be removed.

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[15] The government (Br. 19) finds it "anomalous" that defendants would choose to prove their own possession of contraband in order to challenge a seizure under the Fourth Amendment. But that is precisely what this Court envisioned in *Brown* v. *United States*, 411 U.S. at 228.

[16] *Cf. Place*, 462 U.S. at 701 & n.3 (discussing *Sanders*). This aspect of *Sanders* was not overruled in *California* v. *Acevedo*, 111 S. Ct. 1982 (1991).

The contraband concealed in the Simpsons' trunk was for that reason "seized," in the same manner that the car and driver were seized when Officer Fifer stopped them.[17]

The government seeks to dispute this conclusion on three grounds, but all of its contentions miss the mark. It first argues (Br. 24) that the Simpsons cannot bring their Fourth Amendment challenge "for the same reasons that the mere stop of the car did not constitute an unreasonable seizure." We have shown above, however, that the stop was an unreasonable seizure. The government's two additional points are similarly in error.

1. *Contraband May Be Illegally Seized.* The government asserts (Br. 24) that the Simpsons cannot contest the illegal seizure of the contraband in their trunk because they "were not legally entitled to possess the cocaine." But possessory interest in an item is a sufficient predicate to challenge the seizure of that item, notwithstanding the fact that it is contraband. *Lisk* stands for precisely this point, for it concerned illegal possession of a bomb. 522 F.2d at 229. Indeed, the government's proposed constitutional rule cuts far too broadly, for it would justify any seizure that led to the discovery of contraband, regardless of how unreasonable the police

[17] The United States also points out (Br. 22-23) that, under our analysis, someone who might have loaned a suit of clothes to the driver would also have had his interests invaded by Officer Fifer's illegal seizure of the car and its contents. Under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), however, it is necessary for one who complains of a seizure also to demonstrate that the seizure led to the evidence he seeks to suppress. In the government's hypothetical, the owner of the seized suit could not have demonstrated that the suit's seizure led to the cocaine in the car's trunk. In contrast, had the Simpsons' car and its contents not been seized, "none of this investigation would have transpired." Pet. App. 34a.

conduct. This is simply not the case. *E.g.*, *Place*, 462 U.S. at 710 (concluding that seizure of luggage that contained cocaine was unconstitutional).

The Court thus held long ago that the possession of contraband may be illegal, but "in abrogating property rights in such goods, [Congress] merely intended to aid in their forfeiture and thereby prevent the spread of the traffic in drugs rather than to abolish the exclusionary rule formulated by the courts in furtherance of the high purposes of the Fourth Amendment." *United States* v. *Jeffers*, 342 U.S. 48, 53-54 (1951) (citing *In re Fried*, 161 F.2d 453 (2d Cir. 1947)). The government's argument was for that reason rejected in *Trupiano* v. *United States*, 334 U.S. 699, 707 (1948), when the government sought to justify the warrantless seizure of a still on the grounds that it was contraband:

> "The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the illegality of the seizure. See *Amos* v. *United States*, 255 U.S. 313 [(1921)]; *Byars* v. *United States*, 273 U.S. 28 [(1927)]; *Taylor* v. *United States*, [286 U.S. 1 (1932)]."

In arguing to the contrary, the government confuses the possessory interests at stake in this seizure from the privacy interests called into question only by a search. For example, it looks to *Jacobsen* for the notion (Br. 24) that one cannot "'privately' possess[] cocaine," but the Court in the quoted passage was concerned with only "any legitimate interest in privacy." *Jacobsen*, 466 U.S. at 123. The government fails to account for the Court's other holding in the same case, that a seizure of the cocaine "did affect respondents' *possessory interests* protected by the Amendment." *Id.* at 124 (emphasis supplied). Its other citations are similarly in error.

2. *Privacy is of No Moment to The Challenge of A Seizure.* The government focuses on the same irrelevant factor when it argues (Br. 15) that "status as a co-conspirator cannot create an expectation of privacy where one otherwise would not exist." Whatever else may be said about this proposition, its focus on privacy interests is clearly irrelevant to the question of whether defendants have the right to assert that their own possessory interests have been violated by a seizure. While possession may at times be insufficient with regard to the privacy interests that are implicated by *searches*, the court of appeals found that the possession demonstrated by the Simpsons was sufficient for them to challenge a *seizure*.

Consequently, none of the holdings cited by the government applies to the issue presently of concern: whether Officer Fifer's seizure implicated the Simpsons' own possessory interests in the seized contraband. For example, in *Salvucci*, two defendants attempted to contest a warranted search of the home of one of their mothers, which disclosed the stolen mail defendants were accused of possessing. Because the defendants challenged only a search and not a seizure, the Court found it insufficient that they retained possession of the mail they had stashed in the place that was searched. "We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." 448 U.S. at 92. At the same time, the Court specifically distinguished seizures, noting that "possession of the seized good" provides the interest necessary for mounting a Fourth Amendment challenge "if the seizure, as opposed to the search, was illegal." *Id.* at 91 n.6.

Similarly, the Court in *Rakas* merely held that those defendants could not challenge only a search of a vehicle. As Justice Powell noted in his concurring opinion, "[t]he

petitioners [did] not challenge the constitutionality of the police action in stopping the automobile in which they were riding." 439 U.S. at 150-51. Nor had either of them "ever asserted that he owned the rifle or shells" discovered as a result of the challenged search. *Id.* at 129; see also *id.* at 130-31 & n.1. The Court therefore held that those petitioners could not challenge the search of an area in which they "would not normally have a legitimate expectation of privacy," *id.* at 149, although it also recognized the right to "contest the lawfulness of the seizure . . . if their own property were seized." *Id.* at 142 n.11.[18]

This thread -- concern with only privacy interests implicated by searches -- runs throughout the cases that the government has inappropriately cited for a very different (and erroneous) proposition: that possession is an insufficient interest on which to premise a challenge to a seizure. In *Alderman*, 394 U.S. at 171-72, for example, the Court found that "a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself." In *Rawlings*, 448 U.S. at 105, the defendant did claim a possessory interest in the contraband he had stashed in Cox's purse, but the Court found that

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[18] *Wong Sun* is to the same effect. Defendants Toy and Wong Sun also allegedly engaged in a conspiracy to possess and transport narcotics, but they suffered no illegal seizure of constructively possessed contraband. Rather, they sought to challenge only the illegal search of Toy's residence, which led to the subsequent surrender by Yee of narcotics. The Court held that the narcotics were inadmissible "fruit of the poisonous tree" as to Toy only because they were tainted by the illegal search of his residence "and not by any official impropriety connected with their surrender by Yee." 371 U.S. at 492. In the context of Wong Sun's similar challenge to the search of Toy, the Court was unconcerned with whether he possessed the narcotics held by Yee, finding instead that the initial search of Toy "invaded no right of privacy of person or premises which would entitle Wong Sun to object to [the narcotics'] use at his trial." *Id.*

possession insufficient to establish a "legitimate expectation of privacy in that purse," and for that reason he "could not challenge the legality of the search of Cox's purse." In all of the other cases of the Court that the United States has cited, neither a seizure nor a possessory interest was at issue. See *Payner*, 447 U.S. at 729, 732 (defendant could not challenge a "flagrantly illegal search" because defendant "has no expectation of privacy"); *Jones* v. *United States*, 362 U.S. 257, 258 (1960) (concerning "a defendant's standing to challenge the legality of a search").[19]

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[19] The lower court cases cited by the government similarly focused on privacy interests and not possessory interests. *United States* v. *Kiser*, 948 F.2d 418, 424 (8th Cir. 1991) ("legitimate privacy expectations of others may not be vicariously asserted"); *United States* v. *Soule*, 908 F.2d 1032, 1036 (1st Cir. 1990) ("it would be difficult to posit a clearer failure to demonstrate any legitimate expectation of privacy on the part of the defendant"); *United States* v. *Manbeck*, 744 F.2d 360, 374 (4th Cir. 1984) ("Defendants have not submitted any other persuasive evidence of a privacy interest in the tractor-trailer."); *United States* v. *Brown*, 743 F.2d 1505, 1508 (11th Cir. 1984) ("he cannot assert a legitimate privacy interest in contraband hidden on Manikowski's person"); *United States* v. *Little*, 735 F.2d 1049, 1053 (8th Cir.) ("Neither [a defendant's] mere presence in the conspiracy nor the acts of his co-conspirators can give him a legitimate expectation [of privacy] ... where none exists otherwise."), *rev'd on reh'g*, 743 F.2d 1261 (8th Cir. 1984); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981) ("A person has no right to assert the inadmissibility of the fruits of an illegal search unless the challenged conduct invades his own legitimate expectation of privacy."); *United States* v. *Davis*, 617 F.2d 677, 691 (D.C. Cir. 1979) ("Davis has claimed no interest in the premises searched, and his interest in the cocaine was not one that suggested a continuing expectation of privacy."); *United States* v. *Galante*, 547 F.2d 733, 740 (2d Cir. 1976) ("neither appellant was present at the time of the initial search"); *United States* v. *Hunt*, 505 F.2d 931, 942 (5th Cir. 1974) ("Although there may well be cases in which a principal may object to a search of his agent's papers or effects, this is not one of them."); *United States* v. *Gerena*, 662 F. Supp. 1218, 1223-24 (D. Conn. 1987) ("defendants have failed to adequately allege the existence of legitimate expectations of privacy in each of the three locations at issue").

Accordingly, the government's contention that the Simpsons are barred from bringing their claim by a footnote in *Brown* v. *United States*, 411 U.S. at 230 n.4, is untenable. The Court in that case was concerned only that the defendants had "no standing to contest the defective warrant used to search [co-conspirator] Knuckles' store," and not a seizure of any item. *Id.* at 230. For that reason, only privacy and not possessory interests were relevant to the analysis. Moreover, the defendants in *Brown* had specifically failed to assert in the lower courts "a possessory interest in the goods at Knuckles' store." *Id.* at 228. The Court therefore held that no contention concerning possession was properly before it. *Id.* at 230 n.4. Even then, the Court held that the defendants could not have possessed the contraband at the time of the search because they had "already 'sold' the merchandise" and the alleged conspiracy had already ended. *Id.* at 230 n.4; see also *id.* at 225, 229. The *Brown* footnote thus cannot control the present case, where the lower courts have found that the Simpsons possessed the contraband because they directly exercised "joint control and supervision over the drugs" at the time their car was illegally seized. Pet. App. 14a.

In the end, therefore, the government's authorities stand for no more than the rather unremarkable notion that conspirators do not automatically share privacy interests against searches. The stop of the Simpsons' car and its contents was not a search, however, and the virtually exclusive concern of the United States with privacy interests is not germane to the Simpsons' possessory interests implicated by Officer Fifer's seizure. Rather, it is their possession of the contraband -- charged by the indictment, claimed by the Simpsons, and found by the lower courts -- which suffices to demonstrate that the Simpsons' own Fourth Amendment rights were implicated by the seizure,

precisely because an illegal seizure violates "possessory interests where neither privacy nor liberty [is] at stake." *Soldal*, 113 S. Ct. at 543.

III. THE QUESTION PRESENTED BY THE PETITION DOES NOT APPLY TO THE SIMPSONS

The question presented by the United States in its Petition concerned only "whether membership in a joint-venture to transport drugs gives co-conspirators a legitimate expectation of privacy." Pet. (i).[20] As this case reaches the Court with regard to the Simpsons, however, it concerns only whether they retained property or possessory interests that afford them the right to challenge a seizure of their car and its contents, not the privacy interests implicated by a search. To be sure, the Simpsons also separately contested the subsequent warrantless search of their locked trunk, contending that it could not be justified by the consent obtained from Arciniega during the course of his illegal detention. *Cf. Royer*, 460 U.S. at 501. But the district court ruled that, because the stop was illegal, "we just don't get to that issue in this case," Pet. App. 29a, and the court of

[20] The Petition was concerned only with privacy interests, and it therefore urged the Court to review this case only because "[t]he question whether co-conspirators can acquire a legitimate expectation of privacy in each other's persons and effects based solely on their joint participation in a criminal venture is of considerable practical importance." Pet. 6. All of the cases that the Petition discussed therein concerned only privacy interests, and the entire thrust of the Petition's argument was that "[a] defendant's role in a conspiracy has no generative force so as to create a privacy interest that does not otherwise exist." *Id.* at 9. Indeed, the United States concerned itself with only privacy issues in its argument before the court of appeals. C.A. Brief of Appellant at 15-16.

appeals similarly did not address whether the search was illegal or whether it implicated the Simpsons' own privacy interests.[21]

Because the privacy issue presented by the government is irrelevant to the Simpsons, the Court may wish to dismiss the writ of certiorari as improvidently granted as to them.[22] Indeed, the Simpsons' situation is virtually identical to the Court's dismissal in *United States* v. *Quinn*, 475 U.S. 791 (1986).[23] In *Quinn*, the United States also framed the question of Fourth Amendment standing in privacy terms: "[w]hether a defendant has a Fourth Amendment expectation of privacy" arising from his status as "a co-venturer in a criminal enterprise." *Id.* at 791 (Burger, C.J., dissenting). It then became evident that Quinn similarly challenged a seizure, not a search. And for that reason the issue on the merits similarly focussed not on

[21] For that reason, if the court of appeals is reversed, a remand should leave it to that court to determine in the first instance all issues related to the legality of the search of the Simpsons' trunk, including the Simpsons' right to contest it.

[22] Neither is a conspiracy issue presented with respect to the Simpsons, whose ownership of the car is established separately from their participation in a conspiracy. It is perhaps for this reason that, when pursuing certiorari, the United States in its Reply Brief (at 5) did not envision reversal with respect to the Simpsons, but merely the remand of this portion of the case "[i]f the Ninth Circuit's 'co-conspirator standing' rule is wrong . . . to have the standing issue as to the Simpsons decided without reference to that factor." The United States, however, offers no reason why it should be provided a second opportunity in this regard. The Simpsons clearly pressed ownership at the suppression hearing, *e.g.*, T.R. 5/8/90 at 73-74, 76, 81-82, 111-12, 128, and this Court has previously held that it will not remand a case only to afford a party the second opportunity the government seeks. *Rakas*, 439 U.S. at 130-31 n.1.

[23] The Petition in this case (Pet. 16 & n.7) reviewed the history of the *Quinn* litigation.

privacy, but on Quinn's claim that his right to bring a challenge was predicated on his property interests in the seized vessel and his possessory interest in the illegal drugs on board. *Id.* at 793. These property and possessory interests were not fairly included in the privacy question that had been presented, however, and the Court dismissed the writ.

Here, too, the property and possessory interests implicated by the seizure of the Simpsons' car and the contraband contained therein are not fairly included within the question presented in the Petition.[24] For that reason, the Court may wish to decline the government's invitation to address issues related to the Simpsons.

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[24] Nor have these issues been properly presented by the government's substitution of a new question presented in its Brief (Br. (i)), which now embraces "property interest[s]." Rule 24.1(a) of this Court states that "the brief may not raise additional questions or change the substance of the questions already presented," and Rule 14.1(a) states that the court will address "[o]nly the questions set forth in the petition, or fairly included therein." Property and privacy interests are "different interests" that are complementary but not subsidiary to one another, *Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987), and for that reason a question that concerns privacy does not fairly include property. *Cf. Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1533 (1992) ("a question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented . . . is not 'fairly included therein'"); *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

CONCLUSION

If the writ of certiorari is not dismissed as to the Simpsons, the judgment of the court of appeals should be affirmed as to them.

Respectfully submitted,

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February 8, 1993

No. 92-207

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER V. PADILLA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE UNITED STATES

1. The Simpsons contend (Br. 30-32) that the question presented in our petition concerned only privacy interests, and that because their standing claim rests entirely on property interests, the question presented does not apply to them.

In our petition, we characterized the question presented as whether "membership in a joint venture to transport drugs gives co-conspirators a legitimate expectation of privacy entitling them to challenge the investigatory stop of one of the members of the conspiracy, and the subsequent search of the vehicle he was driving." That question clearly embraced both the seizure (the investigatory stop of the car) and the ensuing search (the search of the car's trunk). We used the term "legitimate expectation of

privacy" because that was the term repeatedly used by the court of appeals to describe its holding in this case. See Pet. App. 9a ("the Simpsons and Xavier Padilla have established a legitimate expectation of privacy"); *id.* at 13a (Maria Simpson "also has established an expectation of privacy"); *id.* at 14a ("We hold, therefore, that because Xavier Padilla and Donald and Maria Simpson have demonstrated joint control and supervision over the drugs and vehicle and engaged in an active participation in a formalized business arrangement, they have standing to claim a legitimate expectation of privacy in the property searched and the items seized.").

The court of appeals used the term "legitimate expectation of privacy" as a shorthand reference to all of the Fourth Amendment interests that might be affected by the police conduct in this case—the right to be free from both an unlawful seizure and an unlawful search.[1] In our petition, we adopted the terminology used by the court of appeals to describe the issue it had decided. In our brief on the merits, we characterized the question presented as whether "membership in a joint venture to transport drugs gives co-conspirators a privacy or property interest entitling them to challenge the investigatory stop of one of the members of the conspiracy and the subsequent search of the car he was driving." We restated the question presented in order to describe more precisely the Fourth Amendment interests that the court of appeals had identified as being at issue in this

[1] The respondents did the same. In their brief in the court of appeals, they characterized the doctrine of Fourth Amendment standing as being "based solely upon 'legitimate expectations of privacy.'" Resp. C.A. Br. 17.

case,[2] and to encompass the arguments that the respondents had intimated (Br. in Opp. 37-38) that they would invoke in support of the judgment below.[3]

In their brief on the merits, the Simpsons do not defend the court of appeals' reasoning in this case, which was explicitly based on the "joint venture" theory of standing. Instead, they argue that they have standing to object to the stop of Arciniega based entirely on their ownership interests in the car Arciniega was driving and the cocaine he was carrying. Then, having recharacterized what they regard as the principal issue in this case, the Simpsons fault us for not having anticipated in our petition the ground on which they would choose to defend the judgment below. They go so far as to suggest that because we did not write the question in a manner that anticipated their response, the petition should be dismissed as improvidently granted.

It is a bold stroke for a respondent to defend the judgment on a different ground from the one used by the court below and then seek dismissal of the petition because the question presented failed to address the respondent's analysis. There is no support

[2] Our rephrasing of the question was consistent with this Court's Rules, see Sup. Ct. R. 24.1(a) ("The phrasing of the questions presented need not be identical with that set forth in the petition for a writ of certiorari * * * but the brief may not raise additional questions or change the substance of the questions already presented.").

[3] See Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* 553-554 (6th ed. 1986) ("the Questions Presented in the briefs on the merits should also include points raised by respondent or appellee as matters of defense, so that the Questions Presented will contain all the issues upon which the Court is called to pass").

for such a ploy in this Court's cases, and it should not be allowed to succeed. The question presented in this case adequately encompasses the issue decided by the court of appeals and the issues raised by respondents in their briefs; in any event, however, we would be entitled to answer any new arguments made by respondents in support of the judgment below even if the question presented did not encompass those arguments.

Respondents are also wrong in claiming that the petition should be dismissed because they will not be affected by a resolution of the issue presented in this case. First, as we noted at the petition stage, the "joint venture" standing doctrine was critical to the decision of this case, both in the district court and in the court of appeals. The district court found that the Padillas had standing "solely out of the joint venture aspect of it." Pet. App. 23a. And the court of appeals based its ruling largely on the Simpsons' "participat[ion] in the [criminal] organization, particularly on the day of the stop" (*id.* at 12a), and Xavier Padilla's "coordinating and supervisory role in the operation" (*ibid.*). The court of appeals also directed the district court on remand to base its standing determination with respect to Jorge and Maria Padilla on "whether they were responsible partners of the venture or mere employees in a family operation." *Id.* at 15a. If we are correct that the respondents' participation in the criminal conspiracy does not give them Fourth Amendment rights that they would not otherwise enjoy, we are entitled at the least to a remand to determine whether respondents have standing under the proper Fourth Amendment standard.

Second, both sides have addressed the argument that the Simpsons' ownership interest in the car and possessory interest in the contraband, and Xavier Padilla's supervisory role in the transportation and possessory interest in the contraband are sufficient to give each of them standing. That issue is therefore suitably presented for decision, and there is no reason for the Court not to resolve it. See *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982). In seeking dismissal of the petition, respondents are simply asking the Court to reconsider the decision that the Court made at the petition stage, where they made a similar argument against granting review; there has been no change of circumstances to suggest that this case is any less suitable for review now than it was when the Court granted the petition.

2. On the merits, respondents have largely abandoned the joint venture standing analysis employed by the court of appeals. The Simpsons rely solely on their ownership of the stopped vehicle and their asserted possessory interest in the cocaine that was incidentally seized when the vehicle was. The Padillas, on the other hand, argue that the Ninth Circuit's joint venture standing doctrine is not really based on the defendants' membership in a criminal enterprise, but is merely a proxy for recognizing that individuals can have property and privacy interests in property that is in the hands of others who happen to be their co-conspirators.[4]

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[4] The brief filed for the three Padillas mentions Jorge and Maria Padilla but focuses almost entirely on the case of Xavier Padilla. The brief takes the position (at 3 n.1) that because the court of appeals remanded the case with respect to Jorge and Maria Padilla, the court's rulings with respect to them "are not contested here." That is not true; we have

The Padillas argue (Br. 25, 47-48) that the Ninth Circuit did not apply a doctrine of *per se* co-conspirator standing, but instead examined the Fourth Amendment interests of each defendant in determining whether he had standing. We recognize, of course, that the Ninth Circuit has not granted standing to every co-conspirator, but has limited the benefits of the joint venture standing rule to conspirators with a supervisory role in the conspiracy. See Pet. 9-11; U.S. Br. 14-15, 27-28. But even in that form, the joint venture standing rule is baseless. An individual's status as a member of a conspiracy—even a supervisory member—has no bearing on whether that individual's personal rights have been implicated by the seizure or the search of another member of the conspiracy, or of property that is used to achieve the goals of the conspiracy. As we have argued (U.S. Br. 11-19), that conclusion follows from this Court's consistent admonition that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted," *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978), and its recognition that "[c]oconspirators and codefendants have been accorded no special standing" under the Fourth Amendment. *Alderman* v. *United States*, 394 U.S. 165, 172 (1969). In short,

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at all stages contested the court of appeals' ruling that Jorge and Maria Padilla would be entitled to standing under the joint venture doctrine if they can show that they had a sufficiently responsible role in the conspiracy. Therefore, if the Court agrees with us that the joint venture standing rule has no place in Fourth Amendment analysis, the court of appeals' remand "to determine whether [Jorge and Maria Padilla] were responsible partners of the venture" (Pet. App. 15a) is erroneous and that aspect of the court of appeals' judgment should be reversed.

interests that arise by virtue of one's role in a conspiracy have no Fourth Amendment currency.

Xavier Padilla does not rely exclusively on the Ninth Circuit's rule granting standing to a conspiracy's leaders, but claims that he had a possessory interest in the car and the cocaine based on his supposed role "as custodian and manager of a vehicle used for a commercial purpose." Br. 12. Relying on the fact that he hired Arciniega to drive the car from Douglas, Arizona, to Phoenix, and was responsible for the arrival of the cocaine in Phoenix, Xavier Padilla claims that he thereby acquired a sufficient interest in the car and the cocaine to render him a victim of the traffic stop, even though he was not present when the stop occurred. Padilla's interests in the car and the cocaine, however, are the interests of a conspirator, not a possessor. Padilla concedes (Br. 20) that he had no Fourth Amendment interest in the person of Arciniega, but he exercised no more dominion and control over the vehicle, which he did not own and in which he never rode, than he did over the person of Arciniega. Similarly, he was never an owner of the cocaine, but merely had a role in attempting to ensure that it was successfully transported to its intended recipient.

In short, Xavier Padilla's role with respect to both the car and the cocaine was that of a dispatcher. A traffic stop of a commercial truck would not violate the Fourth Amendment rights of the dispatcher of the truck—even one who had hired the driver. The same applies to Xavier Padilla. For that reason, even Padilla's effort to characterize the criminal conspiracy as a "business agreement" (see Br. 34) does not help him, because the parties to a "business agree-

ment" to transport goods do not have Fourth Amendment interests that are violated if an agent of the business is stopped while engaged in the transportation.[5] Padilla's argument therefore reduces to a straightforward—and unmeritorious—claim of co-conspirator standing. It should be rejected.

3. The Simpsons have departed even farther from the court of appeals' rationale. Without relying at all on the "joint venture" rationale of the court of appeals, they seek to base their standing solely on their property interest in the car and their asserted possessory interest in the contraband.

a. It is undisputed that the traffic stop of the car Arciniega was driving was a Fourth Amendment seizure. The question before the Court, however, is whether the seizure of the car (and the incidental seizure of the contraband in the car's trunk) implicated the Fourth Amendment rights of the Simpsons or any of the other respondents. Under this Court's cases, respondents' rights were implicated only if the seizure constituted a "meaningful interference with [their] possessory interests in th[e] property."

[5] Even if Padilla's "business agreement" had a formal legal status such as that of a corporation, his claim of standing would fail. Owners and officers of corporations typically do not have Fourth Amendment interests that are affected by searches or seizures of corporate effects, unless the search or seizure has a direct nexus to the individual's personal office or papers. See 4 Wayne R. LaFave, *Search and Seizure* § 11.3(d), at 314-318 (2d ed. 1987); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968); *United States* v. *Mohney*, 949 F.2d 1397 (6th Cir. 1991), cert. denied, 112 S. Ct. 1940 (1992); *United States* v. *Chuang*, 897 F.2d 646 (2d Cir.), cert. denied, 498 U.S. 824 (1990); *United States* v. *Judd*, 889 F.2d 1410 (5th Cir. 1989), cert. denied, 494 U.S. 1036 (1990); *Williams* v. *Kunze*, 806 F.2d 594 (5th Cir. 1986).

United States v. *Jacobsen*, 466 U.S. 109, 113 (1984); see also *Arizona* v. *Hicks*, 480 U.S. 321, 324 (1987); *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985); *United States* v. *Karo*, 468 U.S. 705, 712-713 (1984); *United States* v. *Place*, 462 U.S. 696, 708-709 (1983).

As we argued in our opening brief (U.S. Br. 21-24), the traffic stop in this case did not result in a "meaningful interference" with the Simpsons' ownership interests in the car. The Simpsons had ceded unconditional control over the vehicle to Arciniega, and the brief traffic stop did not in any way affect their anticipated use of the car on its return. Of course, the traffic stop ripened into an arrest of Arciniega and a seizure of the drugs and the car. But the discovery of the drugs was the product of Arciniega's consent.[6] The only illegal conduct at issue here is the traffic stop, and the question therefore is whether the brief detention prior to the discovery of the cocaine constituted a meaningful interference with the Simpsons' possessory interests in the car.

The traffic stop may have resulted in anxiety and inconvenience to Arciniega, but it had no such effect on the Simpsons, who were not present and were not aware of the stop at the time it occurred. In short, the Simpsons did not meet their burden, see *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980), of establishing that the seizure of the vehicle in this case constituted

[6] Respondents assert that the trunk of the car was searched without consent. Simpson Br. 2, 14. The police officer testified without contradiction, however, that Arciniega consented to the search of the entire vehicle. 5/15/90 Tr. 95. The court of appeals did not call into question the validity of Arciniega's consent, see Pet. App. 3a, and that issue is not before this Court.

a meaningful interference with their own Fourth Amendment interests.

The case that is most instructive on this point is *United States* v. *Powell*, 929 F.2d 1190 (7th Cir.), cert. denied, 112 S. Ct. 584 (1991). In a factual setting closely analogous to the one in this case, the court held that the absent owner of a truck that was illegally stopped on the highway did not have standing to object to the stop of the truck. The court explained that the seizure of the vehicle implicated interests that "are personal to the driver and passengers in the car stopped, who have their travel interrupted by the sight of a state patrol cruiser or police car looming large in the rear view mirror, are detained on the side of the road, have their identifying documents inspected by the trooper or policeman, and may even be asked to leave their vehicles for the duration of the questioning." 929 F.2d at 1195. For that reason, the court concluded, "the intrusion a vehicle stop causes is personal to those in the car when it occurs. The personal nature of the interests implicated by a vehicle stop persuade us that a vehicle owner who is not in his car at the time it is stopped should not, absent unusual circumstances * * * have standing to object to the stop." *Ibid.* The court noted that the possessory interest of the vehicle's owner would be implicated only if, for example, the stop lasted so long that it "meaningfully deprive[d] the vehicle owner of the anticipated use of his car or truck." *Ibid.*

The same analysis applies here. Because in this case, as in *Powell*, the stop of the vehicle did not meaningfully deprive the owners of the car of the anticipated use of the car, the absent owners should

not be entitled to obtain the suppression of evidence based on the illegality of the stop.[7]

In an analogous setting, the courts have held that a defendant's Fourth Amendment rights are not violated if the police remove the defendant's checked luggage temporarily from an airline baggage area for an on-the-spot dog sniff. See *United States* v. *Brown*, 884 F.2d 1309, 1311 (9th Cir. 1989); *United States* v. *Lovell*, 849 F.2d 910, 916 (5th Cir. 1988); *United States* v. *Beale*, 736 F.2d 1289, 1292 (9th Cir.) (en banc), cert. denied, 469 U.S. 1072 (1984); *United States* v. *Puglisi*, 723 F.2d 779, 787 (11th Cir. 1984); *United States* v. *Goldstein*, 635 F.2d 356, 361 (5th Cir. 1981); see also *United States* v. *Harvey*, 961 F.2d 1361, 1364 (8th Cir. 1992) (same rule applied to luggage on bus). In that setting, the defendant's "possessory interests were not impaired by the seizure because he had relinquished possession to the airline for a number of hours and had the dog not alerted the luggage would have been immediately returned to the baggage cart with no delay, injury, or impairment. Indeed, the owner would have been oblivious to the entire occurrence." *Puglisi*, 723 F.2d at 786 n.7, 788. Likewise, here, the stop did not affect the Simpsons' possessory interests in the car. The Simpsons had relinquished possession of the car

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[7] Rather than addressing the analysis of the court in *Powell*, the Simpsons argue (Br. 17-18) simply that it rested on the same "cramped reading" of what constitutes a seizure that this Court rejected earlier this Term in *Soldal* v. *Cook County*, 113 S. Ct. 538 (1992). But the Seventh Circuit in *Powell* did not question that a seizure occurs when a vehicle is subject to a traffic stop. The court's analysis turned on the very different point that a traffic stop of a vehicle does not ordinarily implicate an absent owner's "possessory interests."

to Arciniega for hours (at least) at the time of the stop; and if the police had not discovered cocaine in the car, the Simpsons "would have been oblivious to the entire occurrence." See also *United States* v. *Van Leeuwen*, 397 U.S. 249, 253 (1970) ("No interest protected by the Fourth Amendment was invaded" by detaining mailed packages for a day after they were deposited in the mail); *United States* v. *LaFrance*, 879 F.2d 1, 7 (1st Cir. 1989) (brief police detention of a parcel that defendants had consigned to a freight carrier did not "intrude on [defendants'] possessory interest" if it did not delay the delivery of the parcel).

b. The Simpsons argue that it is irrelevant whether the stop of the car had a discernible impact on their possessory interests; they assert, instead, that this Court "has repeatedly held" that "an owner always has the right to contest the seizure of his own property." Simpson Br. 10 (citing *Soldal* v. *Cook County*, 113 S. Ct. 538 (1992); *United States* v. *Jacobsen*, 466 U.S. 109 (1984); *United States* v. *Place*, 462 U.S. 696 (1983); and *Rakas* v. *Illinois*, 439 U.S. 128 (1978)). Their assertion is incorrect, and the cases they cite do not support that proposition.[8]

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[8] *United States* v. *Place* involved the "seizure of personal luggage from the immediate possession of" its owner, and because the owner was in transit, the seizure of the luggage was in effect a seizure of the owner. 462 U.S. at 708. The Court noted that the nature of the intrusion on possessory interests would be far different if the seizure were made "after the owner has relinquished control of the property to a third party." *Id.* at 705. In fact, the Court quoted with approval a commentary on *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), noting that a 29-hour detention of mailed packages did not intrude upon "either a privacy interest in the packages or a possessory interest in the packages themselves." 462 U.S. at 705-706 n.6. We agree that an absent owner whose property is seized from a bailee *may* have standing to contest its seizure—particularly if the seizure delays the return of the property to the owner for a substantial period. But nothing in *Place* suggests that owners of property *always* have standing to object to the seizure of that property, even when that property is taken from third parties and the duration of the seizure is brief.

United States v. *Jacobsen* is equally unhelpful to respondents. That case involved the search of a package which the defendant had shipped by a private freight carrier and which federal agents had obtained from the carrier. The Court noted that the decision by the agents to exercise dominion and control over the package constituted a seizure. 466 U.S. at 120-121 n.18. That observation, however, did not suggest that the defendants would have had standing to object to a temporary seizure of the package if there had been no accompanying search. The question whether the defendants had a Fourth Amendment interest that was affected by the seizure was not at issue in that case; in fact, the defendants specifically disclaimed any argument based on the legality of the seizure, stating that they "have never challenged the agents' seizure of the package by taking it into custody." 82-1167 Resp. Br. at 26.

The footnote from *Rakas* that respondents cite, 439 U.S. at 142 n.11, merely states that the rule that a temporary visitor may not object to the search of the house he is visiting does not necessarily mean he "could not contest the lawfulness of the seizure of evidence * * * if [his] own property were seized." The footnote certainly does not say that an owner of property automatically has standing to object to any seizure of that property. And nothing in *Soldal* supports such a rule; that case merely stands for the proposition that a seizure may come within the reach of the Fourth Amendment even if it does not result in an invasion of privacy. 113 S. Ct. at 543-548.

It is true that an ownership or possessory interest in property is a necessary condition to contesting its

seizure, but the Court has never intimated, much less held, that ownership, without more, is *always* enough.[9] See *United States* v. *Salvucci*, 448 U.S. 83, 91 (1980) (citation omitted) ("While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of this Court's inquiry."). On the contrary, since rejecting the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), the Court has required an analysis of the interests affected by a particular search or seizure in determining questions of standing. See *Rawlings* v. *Kentucky*, 448 U.S. at 105.

In spite of this Court's recent decisions on Fourth Amendment standing, the Simpsons advocate a *per se* rule that a seizure of property in which one has an ownership interest *always* meaningfully interferes with that interest, no matter what the circumstances and no matter whether there was any actual injury to the owner or impairment of his enjoyment of the property. In the view pressed by the Simpsons, a seizure of one's property—even if he has given up control of the property, has no expectation of its imminent return, and may be hundreds of miles away —constitutes a "meaningful" Fourth Amendment injury in every case.

That argument, which is based on the notion that a seizure of property always works some abstract

[9] In fact, this Court has held that an interference with an owner's property interests does *not* necessarily violate the owner's Fourth Amendment rights. *United States* v. *Karo*, 468 U.S. at 712-713 (physical trespass "is neither necessary nor sufficient to establish a constitutional violation"); *Oliver* v. *United States*, 466 U.S. 170, 176-177 (1984).

injury on the owner, relies on nothing more than the "arcane distinctions developed in property * * * law," *Rakas*, 439 U.S. at 143, that the Court has repudiated as the test for determining whether an individual has a Fourth Amendment interest. Our submission, consistent with this Court's cases, is that ownership is a significant, but not dispositive, factor. And, under the circumstances of this case, the Simpsons' ownership of the car did not convert the brief traffic stop of Arciniega into a violation of the Simpsons' right to be free from unreasonable searches and seizures.[10]

[10] *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), does not support the Simpsons' assertion that an ownership interest gives an individual standing to object to a seizure in all circumstances. In *Cardwell*, the police arrested the defendant and impounded his automobile, which had been parked in a public lot near the police station. The police then refused the defendant's request to allow his wife and family to reclaim the car. 417 U.S. at 595 (plurality opinion). Although the question of standing was not raised in that case, it was obvious that the permanent seizure of the defendant's car from where he had left it (and where he had every reason to expect it to remain) meaningfully intruded on his rights as the car's owner—including the right to have his wife and family gain possession of the vehicle. *Cardwell* thus says nothing about whether the Simpsons' rights as owners of the vehicle in this case were affected by the brief traffic detention while Arciniega was using the car to transport the cocaine. The lower court cases cited by the Simpsons for the proposition that "absent owners have the right to object to the temporary investigative seizure of their property," Simpson Br. 16, likewise do not support their claim that the owners of property have a *per se* right to object to seizures, regardless of the circumstances. *United States* v. *Kelly*, 529 F.2d 1365 (8th Cir. 1976), and *United States* v. *House*, 524 F.2d 1035, 1042 & n.12 (3d Cir. 1975), did not involve temporary seizures; in *Kelly* an FBI agent took materials that were contained in a shipment addressed to the defendant and kept them, and in *House* an IRS agent

4. Respondents also argue (Simpson Br. 19-20; Padilla Br. 20-21) that their possessory interests in the cocaine in the car's trunk give them standing to challenge the stop of the car. Even assuming that respondents had a legitimate possessory interest in the contraband, the incidental seizure of the cocaine did not in any sense "meaningfully interfere" with that interest. They therefore should not be permitted to challenge the legality of the stop based on the fact that the cocaine was stopped at the same time the car was.

a. The brief detention of the cocaine associated with the traffic stop did not "meaningfully interfere" with respondents' possessory interests any more than did the brief detention of the car itself. See U.S. Br. 24-27. The seizure of the cocaine incident to the stop of the vehicle was no different than the seizure of a spare tire that might also have been in the trunk, or of a weapon or money that might have belonged to

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took the defendant's papers to his office for an extended period of time. In *United States* v. *Haes*, 551 F.2d 767, 769 (8th Cir. 1977), the court found standing based on the defendant's status as the victim of a search. The court did not address whether the defendant would have had standing to object to a temporary seizure by itself.

In *United States* v. *Shaefer*, 637 F.2d 200 (3d Cir. 1980), the court held that a corporation and its president were entitled to contest the investigative stop of the company's trucks. The court based its standing decision on the fact that the two defendants were exercising their possessory interest in the trucks through their agent-drivers and on the defendants' interests in the documents that were seized and examined as a result of the stops. While we believe that the court erred to the extent that it based the president's standing on the stop of his employees, the court did not go as far as respondents would go and adopt a *per se* rule of owner standing.

respondents but was being carried by Arciniega. The traffic stop did not have any significant effect on the possessory rights of the respondents to property that they had entrusted to Arciniega, including the cocaine. It was not until the temporary stop ripened into a consensual search of the vehicle, which led to the discovery of the cocaine, that respondents' interests in the cocaine—whatever those interests were—were significantly affected.[11]

Respondents contend that a "possessory interest in an item is a sufficient predicate to challenge the seizure of that item, notwithstanding the fact that it is contraband." Simpson Br. 24; see also Padilla Br. 36-37. They urge, moreover, that this issue is easily resolved, because the government has "admitted" that they had such a possessory interest by indicting them for possession of the cocaine.[12] It is, however, "clearly establish[ed] that a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amend-

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[11] Respondents' true quarrel is not with the seizure of the cocaine that was incidental to the vehicle's stop, but with its discovery as part of the subsequent consensual search of the trunk. It is clear, however, that it was perfectly appropriate for the officers to seize the cocaine when they discovered it, and that in doing so they violated no rights of respondents. See *Horton* v. *California*, 496 U.S. 128, 134 (1990); *Texas* v. *Brown*, 460 U.S. 730, 738-739 (1983) (plurality opinion); *Payton* v. *New York*, 445 U.S. 573, 587 (1980).

[12] We note that, in proving respondents' substantive crime of possession of the cocaine, the government is not required to prove that their possession extended to the time the cocaine was discovered on the highway. See *Brown* v. *United States*, 411 U.S. 223, 228 (1973) ("the Government's case * * * does not depend on petitioners' possession of the seized evidence at the time of the contested search and seizure").

ment deprivation, without legal contradiction." *Salvucci*, 448 U.S. at 90 (citing *Rakas* v. *Illinois*, 439 U.S. 128 (1978)). Respondents' argument is nothing more than an effort to resurrect the long-discarded "unexamined assumption" in *Jones* v. *United States*, 362 U.S. 257 (1960), that "a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment 'standing,'" *Salvucci*, 448 U.S. at 90.

b. In any event, we do not believe that, for Fourth Amendment purposes, respondents had any possessory interest in the cocaine. To the extent that they claim such an interest arising out of their participation in the conspiracy to transport the drugs, that claim fails for the same reason that their claim with respect to the vehicle does. See U.S. Br. 13-19, 24-27. Moreover, respondents do not claim to have owned the drugs; at most, they served as bailees for the drugs, which they were jointly responsible for transporting. Respondents therefore have an even more attenuated interest in the cocaine than did the defendant in *Rawlings* v. *Kentucky*, *supra*. There, after the defendant put his drugs in his companion's purse, the Court held that he lacked standing to object to the search of the purse and the seizure of the drugs. 448 U.S. at 105-106. The fact that the defendant claimed a possessory right in the drugs did not give him standing to raise a Fourth Amendment claim with respect to the invasion of the purse. By direct analogy respondents' asserted possessory interest in the cocaine does not give them standing to object to the traffic stop of Arciniega.

Finally, respondents cannot be said to have had a legitimate possessory interest in the cocaine. As the Court stated in *Jacobsen*, "Congress has decided—

and there is no question about its power to do so—to treat the interest in 'privately' possessing cocaine as illegitimate." 466 U.S. at 123. See also *Brown* v. *United States*, 411 U.S. 223, 230 n.4 (1973). Consistent with that view, this Court has recognized that the authorities may seize contraband when they see it, a rule that is based on the premise that the possessor of contraband is not entitled to retain possession. See, *e.g.*, *Horton* v. *California*, 496 U.S. 128, 134 (1990); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983); *Payton* v. *New York*, 445 U.S. 573, 587 (1980).[13] Respondents may not base their Fourth

[13] Respondents object to what they view as the sweeping nature of this argument. In fact, however, the argument is much more limited than they recognize. For practical purposes, it is rare for the authorities to *seize* contraband without also *searching* for it. And it is well established that one does not lose his expectation of privacy in a place simply because he has stored contraband there. See *Salvucci*, 448 U.S. at 93; *Rawlings* v. *Kentucky*, 448 U.S. at 104-106.

The Simpsons rely (Br. 25) on *Trupiano* v. *United States*, 334 U.S. 699 (1948), and *United States* v. *Jeffers*, 342 U.S. 48 (1951), for the proposition that contraband is protected from illegal seizure. The decision in *Trupiano*, however, turned on the Court's unwillingness to apply the "search incident to arrest" doctrine to uphold a seizure that followed a warrantless entry into private premises. See 334 U.S. at 705-710. To the extent that *Trupiano* suggests that police may not seize contraband without a warrant, later cases, such as *Texas* v. *Brown*, 460 U.S. 730 (1983), and *United States* v. *Jacobsen*, 466 U.S. at 123, have established a different rule. See also *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950) (overruling *Trupiano* "[t]o the extent that [it] requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest"). With respect to *Jeffers*, the Court has recognized that standing in that case was based on the

Amendment claim on a possessory right that the law does not allow them to have.

* * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed as to respondents Donald and Maria Simpson, Xavier Padilla, Jorge Padilla, and Maria Padilla. As to respondent Warren Strubbe, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1993

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defendant's "possessory interest in both the premises searched and the property seized." *Rakas*, 439 U.S. at 136; *Salvucci*, 448 U.S. at 91 n.5.

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No. 92-207

In The
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

XAVIER V. PADILLA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED BY PETITIONER

Whether membership in a joint venture to transport drugs gives co-conspirators a privacy or property interest entitling them to challenge the investigatory stop of one of the members of the conspiracy, and the subsequent search of the car he was driving.

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INTEREST OF *AMICUS CURIAE*

This *amicus* brief is filed with the consent of the parties.

The National Association of Criminal Defense Lawyers, Inc.. (NACDL) is a non-profit voluntary association

of criminal defense lawyers founded in 1958 with its office in Washington, D.C. The American Bar Association recognizes NACDL as an affiliate organization, and NACDL has full representation on the ABA House of Delegates. Among its purposes and missions stated in its bylaws are: "to promote the proper administration of justice," "to ensure justice and due process for persons accused of crime," and to promote "continued recognition and adherence to the Bill of Rights [which is] necessary to sustain the quality of the American system of justice."

NACDL has over 7,100 lawyer members in all 50 states, Puerto Rico, Guam, the Mariana Islands, Canada, and some other common law countries. NACDL has 62 state and local affiliates from Hawaii to Florida and even in Canada and approximately 27,000 affiliate members. Counsel for NACDL is a member of its Board of Directors and the author of a treatise on the Fourth Amendment.

In this case, *amicus* files this brief in support of the respondents to argue the policies underlying the Fourth Amendment issues in this case.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

SUMMARY OF THE ARGUMENT

The Government has too simply stated its Question Presented. Rather, the question should be whether a co-conspirator *can* have standing under the facts of this case. This case presents the issue fairly well, because respondents Xavier Padilla and the Simpsons had dominion and control over the vehicle through a person acting at their direction sufficient for constructive possession and a privacy interest to arise even though that were not in physical possession.

The core issue in any standing inquiry is whether the person challenging the search and seizure had an expectation of privacy in the place searched or the thing seized. "[T]he Fourth Amendment protects people not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). There are two prongs: a subjective prong and an objective prong. *Id.* at 361 (HARLAN, J., concurring). The first is easy to establish or disprove based on what the accused did to conceal the object seized. The second is more difficult, and it derives from an analysis of property law, concepts of privacy, and common understandings of the relationships between people and their property. The Court cannot simply focus on the fact that a car was involved. Much more is required under the Fourth Amendment and society's notions of its privacy.

It is clear from the cases of this Court that these concepts all work together to bear on the result. First, society recognizes that people put things in the locked trunks of their cars to secrete and protect them from interlopers, and they do not expect the police to stop and search their trunk without cause. This is a common understanding of basic

privacy in American society. Second, a person can be in constructive possession of property by his intention and exercise of control and dominion over an object not in his actual possession at that time. That is precisely the holding of the court of appeals under the facts of this case.

If this Court refuses to find standing under these facts, it will stamp its imprimatur on wholesale violations of the Fourth Amendment which will inevitably develop. The police will have incentive to violate it rather than follow it in the name of effective law enforcement with the sanction of this Court. The police need to be deterred from violating the Fourth Amendment and not given any incentive to violate it.

There can be no drug case exception to the Fourth Amendment as the Government seems to suggest in its brief. *United States v. Karo*, 466 U.S. 705, 717 (1984).

ARGUMENT

I.

INTRODUCTION

Amicus submits that the issue as stated by the Government is too simply stated. "[M]embership in a joint venture" or simply being a "co-conspirator" does not *ipso facto* create standing; the nature of the relationship between the joint venturers or conspirators as shown by the facts of the case and their expectation of privacy as shown by what they were doing is what makes standing. The question here should be "*can* a co-conspirator have stand-

ing."[1] The key to the law of standing in all the cases from this Court has been whether the person challenging the search had an expectation of privacy in the place searched.[2] This is a substantive question under the Fourth Amendment. *Rakas v. Illinois,* 439 U.S. 128, 140 (1978). If there is an expectation of privacy, the person has standing. He neither need be present nor in immediate possession of something to challenge a search if he actually has an expectation of privacy. A co-conspirator, under the proper circumstances, should be able to claim standing if the nature of his relationship with the property and his co-conspirators is such that he has dominion and control over the vehicle through his agent. This Court has never faced this question, but this is such a case. This case presents an opportunity for principled analysis of the *Katz* expectation of privacy test. Without such an analysis, the consequences could be disastrous for individual liberty in this nation--this case reaches far beyond the parties of this case.

Amicus also urges to Court to not be influenced by the fact this is a drug case involving a massive quantity of cocaine and an incredible potential sentence.[3] The fundamental constitutional right involved in this case is too precious to be the victim of even a subconscious aversion to the level of the crime. But, the level of crime underscores *amicus'* deterrence argument in Point III, *infra.*

II.

WHAT IS A "REASONABLE EXPECTATION OF PRIVACY"?

In the context of standing, the Court should not be seduced into simply looking at the object of the initial seizure; *i.e.*, a vehicle driving on a highway with a sole occupant. Instead, the Court must focus on the relationship created and understood between the people involved in the conspiracy because "the Fourth Amendment protects people, not places." *Katz v. United States,* 389 U.S. 347, 351 (1967). Further, "[w]hat [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* *Katz* made it clear that an analysis of property interests does not control Fourth Amendment analysis, but they do remain important. *Id.* at 353, citing *Warden v. Hayden,* 387 U.S. 294, 304 (1967). *See also Minnesota v. Olson,* 495 U.S. 91, 96 n.5 (1990).

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[1] The Government's address book hypothetical from page 18 n.6 of its Brief demonstrates the simplistic view it seems to take. More facts are required to determine whether another person would have standing in the address book. A co-conspirator may or may not have standing in its hypothetical situation, depending on the facts of the case. The example given by the Government, with no more facts, is more a rhetorical question rather than a hypothetical.

[2] It has been argued elsewhere that standing should extend to co-conspirators and others because of their status without regard to all the facts of the case. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.1(5) (Official Draft 1975). In fact, many states as a matter of policy have decided that certain classes of defendants are entitled to standing as a matter of state law independent of the Fourth Amendment. 1 HALL, SEARCH AND SEIZURE § 6:18 (2d ed.1991).

[3] U.S. Sentencing Guidelines § 2D1.1(c)(3) dictates that this is a level 38 offense. The Government contends that Xavier Padilla is a "kingpin" which increases the level by 4 points. He is thus facing a potential sentence of 360 months to life.

There are two prongs to analyzing the reasonable expectation of privacy in any Fourth Amendment case: whether the defendant "exhibited an actual (subjective) expectation of privacy"; and whether the expectation is "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (HARLAN, J., concurring). The first question is usually easy to determine; the latter is not always easy.

A. HAS THE DEFENDANT "EXHIBITED AN ACTUAL (SUBJECTIVE) EXPECTATION OF PRIVACY"?

It is evident from this record that the co-conspirators did have an actual, subjective expectation of privacy in the vehicle with the 560 pounds of cocaine in it. The Court of Appeals stated, Pet.Cert. at 10a, *United States v. Padilla*, 960 F.2d 854, 859 (9th Cir.1992):

> In ruling that all the defendants had standing, the district court determined that they were clearly participants in a joint venture. The defendants were "involved in the joint control over a very sophisticated operation involving ownership in Mexico or Columbia, [and] transportation aspects of the business [were] controlled by these people, and I think under those circumstances they have standing." With respect to [the Simpsons and Xavier Padilla], we agree. Not only was there a formal arrangement for the transportation, the defendants shifted responsibility for the contraband between each other at various stages of the relay. (first two brackets in original; third added)

The court then recounted the facts in detail about the nature of the role of the Simpsons and Xavier Padilla in this conspiracy and how they "demonstrated joint control and

supervision over the drugs and vehicle and engaged in an active participation in a formalized business arrangement [sufficient to give them] standing to claim a legitimate expectation of privacy in the property searched and the items seized." *Id.* at 12a-14a, 960 F.2d at 860-61 (bracketed material added).[4]

This subjective prong should usually be easy to establish, but it can be quite elusive, and, in the extreme, it can even become meaningless. Justice Harlan recognized this himself in *United States v. White*, 401 U.S. 745, 784 (1971) (HARLAN, J., dissenting). *Accord:* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN.L.REV. 349, 384-85 (1974) (If the Government announced that all rights were suspended and wholesale searches began occurring, could the Government create a subjective expectation of no privacy.) This case does not present the extreme, except maybe to the extent suggested by Point 2.C. of the Government's brief, addressed herein at Point IV, *infra*. If the Government wins, the extreme example from Amsterdam will occur. *See* Point III, *infra*.

At bottom, the Court must look to whether the defendant "took normal precautions to maintain his privacy." *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *United States v. Dunn*, 480 U.S. 294, 303 (1987). In this case, the defen-

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[4] As to two other defendants, the Court of Appeals remanded for further factual development; Pet.Cert. at 14a-15a, 960 F.2d at 861; and as to a third held he had no standing because he "demonstrated no active control or supervision over the drugs or the vehicle involved in this conspiracy." *Id.* at 15a-16a, 960 F.2d at 861-62.

dants wrapped and concealed the cocaine in the locked trunk of a vehicle intended to transport it, and they were engaged in an elaborate plan to have the vehicle driven from Mexico first to Tempe, Arizona, where it would be picked up by two of the co-conspirators (Xavier's wife and brother) to go on to California. The cocaine was not sitting in the backseat exposed to the world; rather, it was well wrapped, concealed, and securely locked in the trunk. They did everything normally possible to maintain their privacy short of welding the trunk shut, which is hardly a normal precaution to preserve privacy.[5] Therefore, this prong of *Katz* is, as the usual case, easily satisfied.

B. Is the expectation "one that society is prepared to recognize as 'reasonable'"?

1. Cases from this Court

This is the objective prong, and it is "rooted in 'understandings that are recognized and permitted by society'"; *Minnesota v. Olson,* 495 U.S. at 100, quoting *Rakas*, 439 U.S. at 144 n.12; or, to a fair extent, property law. Further, the *Rakas* Court said in n. 12:

> Legitimation of expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who owns or lawfully possesses or *controls* property will in all likelihood have a legitimate expectation of privacy by virtue of his *right to exclude*. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected both in *Jones, supra,* and *Katz, supra.* But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of privacy interests protected by that Amendment. (emphasis added)

The Court has long recognized that a person does not have to be present at the time of a search and seizure to have standing as long as he or she has an expectation of privacy. *See, e.g., United States v. Jacobsen,* 466 U.S. 107, 114 (1984) (defendant had standing to challenge search and seizure of package he put in the hands of Federal Express; but he lost on the merits of the search); *Alderman v. United States,* 394 U.S. 165 (1969) (absent homeowner could object to illegally monitored conversations of others monitored from his home); *Mancusi v. DeForte,* 392 U.S. 364, 368-69 (1968) (absent defendant had standing to challenge a search of his desk and file cabinet in a common office area); *Jones v. United States,* 362 U.S. 257 (1960) (overruled on other grounds *United States v. Salvucci,* 448 U.S. 83 (1980)[6]) (absent defendant

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[5] Indeed, a trunk welded shut would probably create reasonable suspicion in and of itself.

[6] While *Jones* was overruled in part by *Salvucci*, and *Jeffers* by *Rakas,* it is clear that both cases would be decided the same under the analysis of *Rakas,* 439 U.S. at 142 n.10, 143-44 n.12,

had standing to challenge search of friend's apartment where he had access and kept contraband); *United States v. Jeffers,* 342 U.S. 48, 52 (1951) (overruled on other grounds *Rakas v. Illinois, supra, see* note 6, *supra*) (absent defendant stored drugs in his aunt's hotel room).

In *Alderman v. United States,* 394 U.S. at 171, and *Brown v. United States,* 411 U.S. 223, 230 n.4 (1973), the Court did state that the mere existence of a conspiracy did not create standing. The issue presented here was not properly preserved by the defendants in *Brown*. Factually, however, *Brown* is far different: those defendants alleged no possessory interest in the stolen goods or the place searched, they sold the stolen goods to Knuckles two months prior to the search, they were nowhere around the day of the search, they were not charged with a possessory offense, and the conspiracy charge itself covered the time period up to the day before the search. *Id.* at 229. The converse of each of these factors is present in this case because of the immediacy of the Simpsons' and Xavier Padilla's right to control the car and its movements.

The objective expectation of privacy is not defeated just because this case involves a large amount of an illegal drug. *See* text accompanying note 3, *supra.* If so, standing in drug cases would cease to be an issue and a huge exception to the Fourth Amendment would have to be created. *See* Point IV, *infra.*

2. Privacy rights, property rights, or both?

Just this past December, the Court again addressed the issue of whether the Fourth Amendment protects privacy

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149 n.16.

rights, property rights, or both. In *Soldal v. Cook County, Illinois,* 113 S.Ct. 538, 544 (1992), the Court stated that the Fourth "Amendment protects property as well as privacy," and further held, *id.* at 544-45:

> Respondents rely principally on precedents such as *Katz,* . . . . *Warden v. Harden,* . . . . and *Cardwell v. Lewis,* . . . to demonstrate that the Fourth Amendment is only marginally concerned with property rights. But the message of those cases is that property rights are not the sole measure of Fourth Amendment violations. The *Warden* opinion thus observed, citing *Jones v. United States,* . . . . and *Silverman,* that the "principal" object of the Amendment is the protection of privacy rather than property and that "this shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform." 387 U.S., at 304 . . . . There was no suggestion that this shift in emphasis had snuffed out the previously recognized protection for property under the Fourth Amendment. *Katz,* in declaring violative of the Fourth Amendment the unwarranted overhearing of a telephone booth conversation, effectively ended any lingering notions that the protection of privacy depended on trespass into a protected area. In the course of its decision, the *Katz* Court stated that the Fourth Amendment can neither be translated into a provision dealing with constitutionally protected areas nor into a general constitutional right to privacy. The Amendment, the Court said, protects individual privacy against certain kinds of governmental intrusion, "but its

protections go further, and often have nothing to do with privacy at all." 389 U.S., at 350 . . . .

This is also clear from *United States v. Jacobsen,* 466 U.S. at 114, which held that a person who put his package in the hands of Federal Express, a private freight carrier, did not lose any privacy interest in the package to not be able to contest a search. *See also Walter v. United States,* 447 U.S. 649 (1980). This was also clear from *United States v. Place,* 462 U.S. 696 (1983), which reiterated the longstanding rule that a warrantless seizure is presumptively unconstitutional; *id.* at 701; and held that the 90 minute detention of Place's suitcase was a seizure under the Fourth Amendment even after a drug dog alerted on it. *Id.* at 707-09. The brevity of a seizure on reasonable suspicion may make it minimally intrusive, and therefore reasonable, *if* the police minimize the intrusion. *Id.*

3. Facts of this case

Again, the facts of this case demonstrate an objective expectation of privacy that society and the law clearly recognizes. Donald Simpson was a Customs official who owned the car the drugs were seized from. He had an integral part in the conspiracy, and he actually facilitated getting the cocaine across the border substantially because of his position as a Customs officer. As the courts below found, "he had a coordinating and supervisory role in the operation. He was a critical player in the transportation scheme who was essential in getting the drugs across the border." Pet.Cert. at 12a, 960 F.2d at 860. His wife, Maria Simpson, drove the car with the drugs from Mexico and turned it over to Xavier who, in turn, turned it over to Arciniega, his knowing agent, the driver who was stopped

by the Arizona state officer.[7] She was the communication link between Xavier Padilla and the El Tejano group in Mexico which supplied it. She oversaw the operation from the Mexican end until the pickup in Tempe. *Id.* at 12a-13a, 960 F.2d at 860. Xavier Padilla was responsible for the purchase of the cocaine in Mexico and transportation through Arizona. He had ultimate responsibility for the cocaine at the time of the stop. He was the one to be called when the driver arrived at the Tempe motel. After the call (orchestrated by the DEA), he sent his wife and brother to pickup the shipment at the motel for the remainder of the trip. *Id.* at 13a, 960 F.2d at 860. These three thus were held to have standing. *Id.* at 14a, 960 F.2d at 860-61. The record as to the Xavier's wife and brother, Maria and Jorge, was insufficient to determine their role, so the case was remanded as to them. *Id.* at 14a-15a, 960 F.2d at 861. A sixth, Warren Strubbe, was held to have no standing because he had no control over the drugs after the driver drove away with them. *Id.* at 15a-16a, 960 F.2d at 861-62.

The Government concedes, as it must, that a traffic stop is a seizure. But, in this case, there is more. This stop is now conceded a "drug courier profile stop" *without any* pretext of reasonable suspicion or probable cause. It is presumptively violative of the Fourth Amendment. The

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[7] Appellee's Supplemental Excerpt of Record in the Ninth Circuit at 3. The Ninth Circuit's opinion states that Maria Simpson arranged for the drugs to be picked up in Mexico and travelled across the border keeping contact with the load. Pet. Cert. at 12a-13a, 960 F.2d at 860. She was in actual control of the shipment when it crossed the border, turned it over to the driver, and then monitored its movements thereafter.

Government earnestly argues it is nevertheless reasonable because it was minimal vis-a-vis the Simpsons and Xavier Padilla since they were not in physical possession at the time. This appears sound on the surface, but *amicus* submits that this completely overlooks the privacy interests involved.

Thus, the Government is on the horns of a necessary dilemma: It wants these people to be actively involved in the conspiracy so it can convict them. On the other hand, it must somehow mitigate these facts so it can try to overcome standing. This is a dilemma that defendants face when they raise standing; it is also a dilemma that the Government must face when it questions standing. Litigators face dilemmas like this all the time; it is how the system works. We seldom can have it both ways.

4. Property law and "common understandings"

Under the undisputed facts developed at the suppression hearing, the Simpsons and Xavier Padilla clearly had constructive possession and a privacy interest in the trunk of the car, so the decision of the court of appeals is correct.

Purely as a concept of property law, the Simpsons and Xavier Padilla had all the elements necessary for possession of the property even though they were not in actual, physical possession at the time of the seizure and search of the car. *See* 63A AM.JUR.2d *Property* § 37, at 268 (1984) ("One may have possession of a chattel, even in the absence of actual personal custody, if the chattel is under his control and in a place where it must have been put by his act or in his behalf, or where the chattel is within his power in such a sense that he can and does command its use."); 73 C.J.S. *Property* § 30, at 224 (1983) ("It is

sufficient if the person has the power and intent to control or exercise dominion over the property, directly or through another person."). There is a wealth of cases in 8A WORDS & PHRASES, *Constructive Possession* 582-83 (1951) & 194-200 (Supp.1992) stating that the elements of constructive possession are the ability and intent to control the disposition or use of personal property in the hands of another or one's agent acting at his direction.

This concept directly ties to the privacy concept. Here, they took all the normal precautions expected of anyone putting their car on the highway. The thing being transported was wrapped and concealed in the locked trunk of the car. It is every citizen's common understanding that the locked trunk of a car is free from prying eyes of the idly curious or the police and an illegal search, notwithstanding the lower expectation of privacy in a car.[8] People commonly store all kinds of things in the trunk of their car even for day-to-day use. When traveling, all one's belongings for the trip will be in the car, locked in the trunk. People leave things in the trunk of the car overnight when they stop at hotels and motels, usually fearful only of a theft of the car by a criminal, not a prying open of the trunk, especially by the police. When the car is in the shop or the hands of a parking attendant, it is commonly understood that the locked trunk remains safe. Indeed, the bailee could be liable for a theft from the trunk if negligent in protecting the car or the keys. 8 AM.JUR.2d *Bailments* § 76, at 813-14 (Rev.ed.1980).

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[8] *See, e.g., Cardwell v. Lewis*, 417 U.S. 583, 590-92 (1974) (plurality opinion); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *California v. Carney*, 471 U.S. 386, 392 (1985); *New York v. Class*, 475 U.S. 106, 112-13 (1986).

Between an automobile user or owner and the Government, there still is and hopefully always will be an expectation that a vehicle will not be stopped arbitrarily and searched without cause. As the Court said in *Delaware v. Prouse*, 440 U.S. 648, 661-62 (1979):

> An individual operating or travelling an in automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971). *Accord: United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). *See United States v. Ross*, 456 U.S. 798, 812-13 & n.17 (1982).

Therefore, a stop intrudes on the rights of all those with actual or constructive possession because their property or privacy rights have been invaded or compromised by

governmental action. As the Government set up the issue for this case, it admits that the stop of the car was arbitrary, unlawful, and without any justification whatsoever--a violation of the Fourth Amendment. If Jacobsen had standing challenge the search and seizure of his package consigned to Federal Express, why cannot these individuals involved in a sophisticated, hands-on conspiracy to import drugs in a vehicle not be able to do the same as to the vehicle?

III.

REFUSAL TO GRANT STANDING UNDER THESE FACTS WILL CAUSE WHOLESALE VIOLATIONS OF THE FOURTH AMENDMENT IN POTENTIAL CONSPIRACY CASES; THERE WILL BE NO DETERRENCE OF THE POLICE FROM VIOLATING THE FOURTH AMENDMENT IN THE NAME OF EFFECTIVE LAW ENFORCEMENT.

The scariest part of what could come from this decision is the clear and unmistakable message it will send to law enforcement: If the Government's position in this case is accepted by the Court, the Fourth Amendment will suffer a serious, and possibly fatal, blow. This runs more deeply than just deterring violations of the Fourth Amendment; the police will actually gain an incentive to violate the Fourth Amendment. The Government's position will easily and inexorably lead to police officers making grossly illegal highway stops to find drugs, knowing full well that the "mule" walks because of the illegal stop, but at least they have an opportunity to make a case against the "kingpin," as they here refer to Xavier Padilla.

The Government's own Brief, at 13, supports our

argument:

> That principle is based on the Court's recognition that it would impose undue costs on the criminal justice system to permit an individual whose rights have not been violated to have the evidence against him suppressed. Because the exclusion of probative evidence "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case," *United States v. Payner,* 447 U.S. 727, 734 (1980), the Court has restricted application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." *Ibid.*, quoting *United States v. Calandra,* 414 U.S. 338, 348 (1974). The Court has stated that it is "beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." *Payner,* 447 U.S. at 735. (citations omitted)

What about the even more costly toll on individual liberty? This is the heart of the matter.

The Government is unknowingly asking this Court to authorize a criminal justice system which inevitably will develop where vehicles are subject to seizure and search without any Fourth Amendment restriction whatsoever. If the driver of the car is the only one in on the deal, then he gets off, but at least insidious drugs are off the street. (*See* note 9, *infra.*) If, however, the driver has co-conspirators or leaders, the case against the driver is easily sacrificed so co-conspirators can be prosecuted to the maximum. The Government calls respondents' position "an unsupported and unsound rule that serves only to confer a Fourth Amendment windfall on defendants like respondents." Govt's Brief at 19. Rather, the Government's position will confer a Fourth Amendment windfall on it because the Fourth Amendment will be emasculated in vehicle searches and seizures. What this Court said twenty-five years ago in *Terry v. Ohio,* 392 U.S. 1, 12-13 (1968), as to the reason for the exclusionary rule is still applicable today:

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct. See *Weeks v. United States,* 232 U.S. 383, 391-393 (1914). Thus its major thrust is a deterrent one, see *Linkletter v. Walker,* 381 U.S. 618, 629-635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp v. Ohio,* 367 U.S. 643, 655 (1961). The rule also serves another vital function--"the imperative of judicial integrity." *Elkins v. United States,* 364 U.S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A

> ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

This case involves much more than another possible "good faith exception" for a warrantless search--it actually connotes a legal *bad faith exception* to the warrant requirement--if the Government wins on this issue, bad faith law enforcement action will be rewarded.[9] In *Alderman v. United States,* 394 U.S. at 175, this Court said: "We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect."

Will the police be deterred by a principled standing analysis that reaches co-conspirators? You bet they will. In a simple costs/benefits analysis, the Fourth Amendment must prevail. As Justice Brandeis said in *Olmstead v. United States,* 277 U.S. 436, 485 (1928) (BRANDEIS, J., dissenting):

> Decency, security, and liberty alike demand that government officials shall be subjected to the

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[9] Justice Brandeis, dissenting in *Olmstead v. United States,* 277 U.S. 436, 479 (1927) (BRANDEIS, J. dissenting) said:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasions of their liberty . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

> same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill will, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

What crime would the government agent be committing? Why, violation of civil rights; 18 U.S.C. § 242; false imprisonment; Ariz. Rev. Stat. § 13-1303; or felonious restraint if a gun is drawn. *See* MODEL PENAL CODE §§ 212.2-212.3 (Proposed Official Draft 1962).

IV.

THERE IS NO "DRUG CASE" EXCEPTION TO THE FOURTH AMENDMENT.

At page 24-25 of its brief (Point C.2.), the Government argues what sounds a whole lot like it is asking the Court to adopt a "drug case" exception to the exclusionary

rule or maybe even the Fourth Amendment.[10] In *United States v. Karo,* 466 U.S. 705, 717 (1984), the Court rejected such an attempt stating that "[t]hose suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses." (bracketed material added) All of the cases cited by the Government under this point of its brief, save *Brown*, have nothing to do with possession as an element of standing. *See United States v. Jacobsen,* 466 U.S. at 123 (a test which is designed to reveal whether a substance is cocaine reveals no "private" fact); *Illinois v. Andreas,* 463 U.S. 765, 771 (1983) (warrantless seizure of imported box from defendant in front of house was valid after customs search revealed marijuana and police attempted controlled delivery but defendant left house with box before warrant arrived); *United States v. Place,* 462 U.S. at 707 (drug dog sniff is not a search).

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[10] At page 24 of its Brief, the Government argues:

> Second, because respondents were not legally entitled to possess the cocaine, the detention or seizure of the cocaine could not deprive them of any lawful possessory interest in the drugs, "Congress has decided--and there is no question about its power to do so--to treat the interest in 'privately' possessing cocaine as illegitimate." *United States v. Jacobsen,* 466 U.S. at 123 . . . .

CONCLUSION

Under the facts of this case, it is apparent that Simpsons and Xavier Padilla had an expectation of privacy in the car because of basic property law, privacy law, and understandings of society and, therefore, standing to challenge this search because of the nature of the relationship created between them. Adherence to the rule of law by the police in this country depends upon this Court engaging in a principled analysis of the expectation of privacy and standing in this case.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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